The Central Law Journal.

ST. LOUIS, APRIL 24, 1891.

OUR attention has been called to an error in a recent issue of this paper. In No. 14, page 294 of this volume, the case of Packer v. Bird, which appeared in full, was a decision of the Supreme Court of the United States, and not of California, as there stated. In fact, the case was selected and published, with annotation, because it is the fullest exposition of the law governing navigable waters in this country, that has ever come from our highest court.

THERE is room at least for two opinions in the Michigan case of Kingman v. Denison, reported in full with annotation in this issue, and though the conclusion of the court may have been warranted by the facts, the question was a close one whether the right on the part of the consignor of the goods, of stoppage *in transitu*, still existed, or, in other words, whether there had been actual or constructive delivery of the goods to the consignee, which is now the prevailing test as to the right of stoppage *in transitu*. The doctrine that the goods must come to the "corporal touch" of the vendee, as was once said by Lord Kenyon, has long since been exploded, and the delivery to the consignee, sufficient to take away the right of stoppage by the consignor, may be constructive as well as actual. If the language and conclusion of the court in the Michigan case may fairly be construed as upholding the necessity of an actual delivery, it is, in so far, opposed to the prevailing authorities.

WE heartily commend the remarks, recently reported to have been addressed to a jury by a San Francisco judge, who, among other things, said that to his mind it was very improper for an attorney who has successfully defended a client to thank the members of the jury for acquitting him. If they have acted conscientiously they have only done their duty, and thanks are out of place. If they have not acted conscientiously they are criminal and thanks then become worse than foolish. Equally well timed was the remark of the same judge to the jurymen themselves, to the effect that he did not consider it at all proper for them to shake hands with and congratulate the man whom they acquitted, and that he hoped to see no more of it in that court.

IT is a matter of satisfaction to us, and we believe also to a large number of our subscribers, that the Index-Digest of all the volumes of this JOURNAL, which has been in course of preparation for the past few months, is now completed and ready for distribution. It is aimed to be a complete digest to the leading articles, legal essays, editorials, cases in full, annotations, notes of recent decisions, book reviews, and legal miscellany in the first thirty volumes of the JOURNAL, being from January, 1874, to July, 1890. The volume is uniform in size with those of the JOURNAL, and is printed in large type, and so arranged as to afford a ready and easy reference to the contents of the JOURNAL volumes. It may be of interest to state that in its preparation the author has entirely disregarded and ignored all previous digests, and has compiled this one anew, and direct from the volumes themselves. The book will be found useful to those who have not the set of volumes, and indispensable to those who have them. The fact that during the period of its seventeen years existence, the JOURNAL has made its regular weekly appearance, containing reviews of current law, articles and essays on subjects of live legal interest, and notes of all recent important cases, necessarily make its volumes veritable storehouses of legal information. The compiler has attempted to make the Index-Digest thorough, accurate, and susceptible to ready use; and it is believed that the care and attention bestowed upon it is evident in its pages, and that it not only furnishes a clear insight into the volumes of the CENTRAL LAW JOURNAL, but also demonstrates their great value to the practitioner.

THE United States Supreme Court recently refused to grant an application for a writ of *habeas corpus* in the murder case of one Dick Duncan, of Texas, in which it was attempted, on the part of the defense, to bring into ques-

tion the validity of the entire criminal code o that State. The court affirmed the judgment of the United States Circuit Court, that the question of the legality of the State code is for the courts of the State to determine. The opinion proceeds upon the idea that the State of Texas is in full possession of its faculties as members of the Union, and its legislative, judicial and executive departments are peacefully operating by orderly and settled methods prescribed by the fundamental law. Whether certain statutes have or have not binding force, is for the State to determine, and that determination, in itself, involves no infraction of the constitution of the United States, and raises no federal question giving its courts jurisdiction.

NOTES OF RECENT DECISIONS.

FEDERAL COURTS—JURISDICTION—CITIZENSHIP—RESIDENCE.—Judge Lacombe, of the United States Circuit Court for New York, in the case of National Typographic Co. v. New York Typographic Co., 44 Fed. Rep. 711, follows the recent ruling of Judge Shiras of the Iowa circuit, in Myers v. Murray (32 Cent. L. J. 22), in holding that under Act of Congress, March 3, 1887, providing that no suit shall be brought in the federal courts in a district other than that of defendant's residence, the circuit court will decline jurisdiction of a suit against a corporation created in a State other than that in which the court is sitting. This has been a much controverted question. Judge Lacombe follows his own ruling in Filli v. Railway Co., 37 Fed. Rep. 65, and those of Judge Brewer in Booth v. Manufacturing Co., 40 Fed. Rep. 1, and Judge Shiras in Myers v. Murray, *supra*, rather than the one adopted in the fifth circuit in Zambrino v. Railway Co., 38 Fed. Rep. 449, and in the third circuit in Riddle v. Railroad Co., 39 Fed. Rep. 290. The court believes that in view of the language of the supreme court in Insurance Co. v. Francis, 11 Wall. 210; *Ex parte* Schallenberger, 96 U. S. 377; Railroad Co. v. Koontz, 104 U. S. 5, and Goodlett v. Railroad Co., 122 U. S. 391, the safe rule for the circuit courts is to decline jurisdiction in cases such as this. The court seems to have overlooked, or at least to lay no stress upon the view of Justice Miller in the Hirschl case (31 Cent. L. J. 93), which is opposed to that of Judge Lacombe. The contention on the one side is, that if a corporation created by the laws of the State comes into a judicial district of another State by its officers and agents, and there carries on business and has an agent on whom, by the laws of that State, process may be served, it is an inhabitant of that district within the meaning of the act of March 3, 1887, and is suable there in the Circuit Court of the United States. On the other side, the opinion of the courts now followed by Judge Lacombe is, that a corporation, although carrying on business in several States, can have a residence only in the State in which it was created, and that the fact of its being created by one State precludes the idea of its being a resident of the other. As we have heretofore shown this view seems reasonable and correct. The opposite doctrine would simply have the effect to exclude all corporations from the United States courts.

CORPORATIONS — DE FACTO— CONTRACT—LIABILITIES OF STOCKHOLDERS.—The Supreme Court of Alabama in Snider's Sons Co. v. Troy, 8 South. Rep. 658, decide that a person who has entered into a contract with a *de facto* corporation in its corporate name and capacity, cannot, in the absence of any averment of fraud, afterwards disregard the existence of the corporation, and sue the stockholders individually as partners on the contract. Clopton, J., after citing Fay v. Noble, 7 Cush. 188; Bank v. Almy, 117 Mass. 476; Stout v. Zulick, 48 N. J. L. 599; Bank v. Padgett, 69 Ga. 164; Bank v. Stone, 38 Mich. 779; Humphreys v. Mooney, 5 Colo. 282; Bank v. Walker, 66 N. Y. 424; Whitney v. Wyman, 101 U. S. 392, which maintain the doctrine that the members of a corporation *de facto* cannot be held liable as partners for the corporate debts, says:

> Corporations may exist either *de jure* or *de facto*. If of the latter class, they are under the protection of the same law, and governed by the same legal principles, as those of the former, so long as the State acquiesces in their existence and exercise of corporate functions. A private citizen, whose rights are not invaded, and who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the State, from whom is derived the right to exist as a corporation, and whose authority is usurped. This principle was clearly and emphatically declared in Lehman v. Warner, 61 Ala. 455, in the

following language: "The corporation must of necessity be presumed to be rightfully in possession of the franchise, and rightfully to exercise the power which the legislative grant confers. Individual right is not invaded, if the negative is true in fact, and there is usurpation. It is the State—the sovereign—whose rights are invaded and whose authority is usurped. The individual could not create the corporation, could not grant, define, limit its powers, and no grant of these by the sovereign can lessen his rights. There can consequently be no cause of complaint by the citizen, and no right to inquire whether corporate existence is rightful *de jure*, or merely colorable." Taylor, Corp. § 145; 4 Amer. & Eng. Enc. Law, 198. The creditor cannot proceed against the stockholders as partners, without proving non-compliance with prescribed conditions precedent, thus inquiring collaterally, not into the fact, but the legality, of its existence.

It is also an established rule of general application, that a party who contracts with a corporation, exercising corporate powers and performing corporate functions, existing as a *de facto* corporation, in its corporate name and capacity, will not be permitted in a suit on the contract to deny and disprove the rightfulness of its existence. 4 Amer. & Eng. Enc. Law, 198. In Swartwout v. Railroad Co., 24 Mich. 390, Cooley, J., declares the rule as follows: "Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence, when it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be, and the questions are only whether there has been exact regularity and strict compliance with the provisions of the law relating to corporations, it is plainly a dictate alike of justice and public policy, that, in controversies between the *de facto* corporation and those who have entered into the contract relations with it, as corporators or otherwise, such questions should not be suffered to be raised." The general rule is thus stated by Brickell, C. J.: "Whoever contracts with a corporation in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the existence of the corporation, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or of rights arising under it, is sought." Cahall v. Association, 61 Ala. 232; Central A. & M. Ass'n v. Alabama G. L. Ins. Co., 70 Ala. 120; Schloss v. Trade Co., 87 Ala. 411, 6 South. Rep. 360. It is conceded that the rule has been invoked and applied most frequently in suits against the stockholders or corporation, or persons who have contracted with it, where the stockholder, or corporation, or person, is seeking to avoid a liability by denying the legality of the corporate organization. But why should it not be applicable in other cases? Why should the stockholder be estopped in a in a suit by a creditor of an insolvent corporation to require payment, of his unpaid subscription, and the creditor allowed to ignore the existence of the corporation and proceed against the stockholder as a partner? Why should not the estoppel be mutual? * * * The doctrine that a creditor who has dealt with a *de facto* corporation in its corporate capacity cannot charge the stockholders as partners with the corporate debt, there being no fraudulent intent alleged and proved, seems to us to be sustained by the weight of authority, maintained by stronger reasoning consistent with well-settled principles, and in harmony with the policy of the State.

NEGLIGENCE — CONTRACTOR—LIABILITY TO THIRD PERSONS.—The case of Curtain v. Somerset, 21 Atl. Rep. 244, decided by the Supreme Court of Pennsylvania, involves a new question. It is there held that a contractor who has completed a building, and turned it over to the owner, is not liable to a third person, who is afterwards injured in an accident caused by the defective construction of the building, since the contractor's duty is only to the owner. Paxson, C. J., says:

That he would be responsible to the company for any loss sustained by it in consequence of his failure to erect the building in conformity to the plans and specifications may be conceded. There was a contractual relation between them, and for breach of a contract, not known to, and approved by, the company, he would be liable. Is he also liable for an injury to a third person, not a party to the contract, sustained by reason of defective construction? It is very clear that he was not responsible by force of any contractual relation, for, as before observed, there was no contract between these parties, and hence there could have been no breach. If liable at all, it can only be for a violation of some duty. It may be stated, as a general proposition, that a man is not responsible for a breach of duty where he owes no duty. What duty did the defendant owe to the plaintiff? The latter was not upon the porch by the invitation of the defendant. The proprietor of the hotel, or whoever invited or procured the presence of the plaintiff there, may be said to have owed him a duty—the duty of ascertaining that the porch was of sufficient strength to safely hold the guests whom he had invited. The plaintiff contended, however, that as the hotel company was not responsible, the contractor must necessarily be so. This, however, is moving in a circle. It by no means follows that, because A. is not responsible for an accident, B or some other person must be.

Authorities are not abundant upon this point, for the reason that it is comparatively new. I do not know of any direct ruling upon it in this State. The true rule, which we think applicable to it, may be found in Wharton on Negligence, § 439. It is as follows: "There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency. Thus, a contractor is employed by a city to build a bridge in a workman-like manner, and after he has finished his work, and it has been accepted by the city, a traveler is hurt while passing over it by a defect caused by the contractor's negligence. Now, the contractor may be liable upon his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveler, intervened the city,

an independent, responsible agent, breaking the causal connection." In section 440 the same learned author refers to the case of a contract with the postmaster general to furnish certain road-worthy carriages; and after the delivery of the carriages the plaintiff is injured in using one of them, by reason of the carriage having been defectively built. "No doubt," says Mr. Wharton, "had the carriage been built for the plaintiff, he could have recovered from the contractor. But there is no confidence exchange between him and the contractor; and between them, breaking the causal connection, is the postmaster general acting independently, forming a distinct legal center of responsibilities and duties." This rule is distinctly recognized in Winterbottom v. Wright, 10 Mees. & W. 115. There one Atkinson contracted with the postmaster general to provide a mail-coach to carry the mail-bags over a certain route. The driver was injured while in this service from a hidden defect in the coach. In a suit by him against Atkinson, it was held that he could not recover; Alderson, J., saying: "The contract in this case was made with the postmaster general; and the case is just the same as if he had come to the defendant, and ordered a carriage, and had handed it at once over to Atkinson. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." Frances v. Cockrell, L. R. 5 Q. B. 501; Heaven v. Pender, 11 Q. B. Div. 503; Collis v. Selden, L. R. 3 C. P. 495; and other English cases—recognize the doctrine that in such instances there is no duty owing from the contractor to the public. As was said by Martin, B., in Frances v. Cockrell, *supra:* "The law of England looks at proximate liabilities as far as possible and endeavors to confine liabilities to the persons immediately concerned." In Losee v. Clute, 51 N. Y. 494, it was held that the manufacturer and vendor of a steam-boiler is only liable to the purchaser for defective materials, or for any want of care and skill in its construction, and if after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs, in consequence of such defective construction, to the injury of a third person, the latter has no cause of action, because of such injury, against the manufacturer. We do not find that any of the cases cited on behalf of the plaintiff conflict with the above views. In Godley v. Hagerty, 20 Pa. St. 387, the builder was the owner, and he was properly held responsible for an inherent weakness in the building by which an accident occurred. In Carson v. Godley, 26 Pa. St. 111, the warehouse was erected under the personal superintendence of the owner, and, having leased it to the government, he was held liable to a person whose goods were destroyed by the fall of the building, in consequence of its sufficiency for the purpose for which it was erected and leased. In Thomas v. Winchester, 6 N. Y. 397, the court held a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, to be liable to all persons who, without fault on their part, are injured by using it. We think this case was correctly decided, but it has no application. The druggist owed a duty to every person to whom he sold a deadly poison to have it properly labeled to avoid accidents. Just here the analogy between his case and the one in hand ceases. The defendant owed no duty to the public, as before stated; his duty was to his employer. We need not pursue the subject further. We regard the weight of authority with the views above indicated. Moreover, they are sustained by the better reason.

WITNESS—PHYSICIAN AND SURGEON—PRIVILEGED COMMUNICATION—WAIVER.—The case of State v. Depoister, 25 Pac. Rep. 1000, decided by the Supreme Court of Nevada, is instructive upon the question of the privilege of physician as a witness, and the right to waive the same. Gen. Stat. Nev. § 3406, provides that a physician shall not be examined, without the patient's consent, as to information acquired in attending the patient: *Held*, that on indictment for rape of a child of seven the privilege may be waived by the implied consent of her parents, and the fact that the prosecution was instituted by them, who, with the child, were the principal witnesses, and testified to the nature of the complaint for which the physician prescribed, warrants such implication. Murphy, J., says:

It is conceded, as shown by the record, that either the child or mother could have given the consent required by the statute. The consent may either be express or implied. Upon this question the Supreme Court of the United States, in Blackburn v. Crawfords, 3 Wall. 194, said: "We think it [the consent] as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony. * * * A different result would involve a perversion of the rule inconsistent with its object and in direct conflict with the reason upon which it is founded." Applying these principles, the facts of this case establish consent by implication. In the present case the prosecution was inaugurated by the parents of the child. Her stepfather laid the complaint before the justice. Her mother and herself were the principal witnesses. The mother testified, among other things, to the statements of the child charging the defendant with the commission of the offense, and to her physical condition, which led to the calling of the physician. Her testimony was of a nature to make public all matters bearing upon the injuries and sufferings of the child as affected by the defendant's acts. It practically disclosed the general nature of the complaint for which the physician prescribed. If any injury could be inflicted by testimony of this nature it was done by the mother's testimony, and, the facts having once been exposed, it would seem that there was no reason why the physician's knowledge should be treated as confidential. At all events, the facts stated show a disposition on the part of the step-father and the mother to prosecute the defendant, and in doing so to waive the protection which the law gave to the confidential information acquired by the physician. It is true, defendant's mother testified that the mother of the child declared she would not again prosecute the defendant; but no other fact was disclosed tending to show such a disposition. The testimony of the physician was introduced in evidence by the prosecution before the defendant's mother testified in his behalf. The court, therefore, knew nothing of the alleged disinclination to prosecute when the physician's testimony was admitted, and no motion to strike it out was ever made. In the case of McKinney v. Railroad Co., 104 N. Y. 354, 10 N. E. Rep. 544, on the first trial of the case,

the plaintiff called the physician who had attended her and treated her for the injuries received, and he testified fully as to her injuries. On the second trial, after the plaintiff had closed her case, not having placed the physician on the stand as a witnesses in her behalf, the defendant called on Chapman, a physician, and proposed to prove by him the injuries claimed to have been suffered by the plaintiff in consequence of the collision in question, as learned by him upon a personal examination of the plaintiff when visiting her as a patient. "The plaintiff objected, upon the grounds that the information acquired by a physician while attending a patient was privileged, and could not, therefore, be admitted against the plaintiff without her consent." "This objection was sustained, the evidence excluded, and the defendant excepted." Ruger, C. J., speaking for the court said: "Such evidence is made incompetent at the option of the patient only, and in case she elects at any time to remove the seal from the lips of the witness, the evidence may properly be received. * * * The patient cannot use this privilege both as a sword and a shield, to waive when it inures to her advantage, and wield when it does not. After its publication no further injury can be inflicted upon the rights and interests which the statute was intended to protect, and there is no further reason for its enforcement. The nature of the information is of such a character that when it is once divulged in legal proceedings it cannot be again hidden or concealed. It is then open to the consideration of the entire public, and the privilege of forbidding its repetition is not conferred by the statute. The consent having been once given and acted upon cannot be recalled, and the patient can never be restored to the condition which the statute, from motives of public policy, has sought to protect. * * * The object of the statute having been voluntarily defeated by the party for whose benefit it was enacted, there can be no reason for its continued enforcement in such cases."

THE court then quotes from the opinion in Pierson v. People, 79 N. Y. 432. Bigelow, J., dissents from the conclusion of the court, saying *inter alia:*

But notwithstanding the quotations made by my associates from the opinion in Pierson v. People, *supra*, in which it was held that the New York statute, of which ours is a substantial copy, did not apply to a case of murder by poisoning, and that, consequently, the physician's testimony was admissible, I do not understand them to hold that the statute is not applicable here, but that the ruling in admitting the testimony is sustained upon the ground that such "consent" to the physician testifying had been given as made it competent. The statute reads that the physician "shall not, without the consent of his patient, be examined as a witness," etc. There is no pretense here that the "patient" had given this consent, but its admissibility is placed upon the ground that the patient's parents, step-father and mother, have given implied consent to his testifying and this, of course, must necessarily assume that the parents have the power to give the required consent, and to waive, for their children, the protection of the statute. But that they do not have this power seems to me reasonably clear from both the letter and spirit of the statute. It does not say that the physician's testimony shall not be admitted without the consent of the patient, or his parents or guardian, or executor or administrator, but the patient alone is mentioned. If it be objected that under such construction his testimony would always be lost where the patient was too young to give consent, or was insane, or dead, it may be replied that this is just what the statute was intended to do. It intended to place the information so obtained upon the same footing as communications between husband and wife, communications to an attorney, or confessions to a clergyman or priest. Such evidence is always to be incompetent except in the single instance of where the party in whose interest it is excluded is able to, and does, give his free consent to its divulgence. Westover v. Insurance Co., 99 N. Y. 56, 1 N. E. Rep. 104. * * * Nor do I understand that it has been conceded by any one that the mother could have given the consent required by the statute. Certainly, to my mind, it has not been done by the defendant or his counsel. But admitting that the parents could give the required consent, the next question is whether they have done so. That there may be implied as well as express consent, there can be no doubt, but the evidence of this implied consent or waiver must be distinct and unequivocal. 1 Whart. Ev. § 584; Hageman, Priv. Com. § 151; Westover v. Insurance Co., 99 N. Y. 59, 1 N. E. Rep. 104. It is supposed that the evidence shows a determination by the parents of the child to prosecute the defendant, and that, consequently, they intend to waive the protection of the statute for the child. Admit the premises, and the conclusion does not by any means follow. There is no logical connection between them. If this is to be the rule, then, in a case where it is supposed the evidence show that the party to make the waiver does not desire the defendant prosecuted, it must be presumed that he has not consented. Before we can ever speculate upon such a state of facts we must know how strong the desire for the defendant's conviction or acquittal is, how much or how little they cared for the physician's knowledge being made public, and all the other considerations that might influence them. It is sufficient to say that this would be no rule at all for the admission or rejection of evidence, and is entirely inadmissible.

RAILROAD COMPANY—INJURY TO BRAKEMAN—OVERHEAD BRIDGE—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.—The case of Williamson v. Newport News & Miss. Valley Co., 12 S. E. Rep. 824, decided by the Supreme Court of West Virginia, follows the current of modern authority on the subject of liability of a railroad company for injuries to brakeman from overhead bridge. It was there held that, although the defendant may not have been free from blame on account of lowness of bridge, yet that the plaintiff's want of proper care contributed to the injury, and that defendant is not liable; that in entering the service of the defendant under the circumstances, the plaintiff was fully aware of the character of the bridge, and while in said service had ample opportunity to become familiar with it, and by continuing in the employment he assumed the risk of being injured by said bridge. English, J., after an

examination of the principal authorities, concludes as follows:

Counsel for the plaintiff in error rely upon the case of Railroad Co. v. Rowan, 104 Ind. 88, 3 N. E. Rep. 627; but it is clearly apparent that that case is very different from the one at bar. The second section of the syllabus reads as follows: "Where a railroad company has constructed and maintains a bridge over its track with knowledge that it is of insufficient height, and dangerous to its employees in the discharge of their duties, it is liable to a brakeman, ignorant of the danger, who is injured while passing under such bridge in the performance of his duties." And so with the case of Kane v. Railway Co., 128 U. S. 91, 9 Sup. Ct. Rep. 16. The facts in that case are very different from the case under consideration. In that case a brakeman was injured by reason of a broken step to one of the cars which caused him to fall from the train. The plaintiff ascertained the fact that the step was broken after the cars had started, and the conductor promised to drop the car out that had the broken step during the night but failed to do so. The cars were similar, and the plaintiff was easily deceived as to the fact whether the car with the broken step had been dropped or not; and the court held it error, on account of the peculiar facts connected with the case, to strike out the testimony from the jury. In the case of Cooper v. Railroad Co., 24 W. Va. 51, relied upon by counsel for plaintiff in error, while it holds that the master is bound to use ordinary care in supplying and maintaining suitable instrumentalities for the work required to be done, it also is held in that case that "the ordinary risks and perils incident to the employment, which the servant can forsee or shun or avoid or guard against by prudence, skill, and forecast, are assumed by him, and they are supposed to enter into the consideration to be received by him for his services." And while it is true that in Illinois, and perhaps several other of the western States, it has been held that it is the duty of a railroad company to so construct overhead bridges as to prevent them from being dangerous to employees walking on the top of the cars in the performance of their duties, yet the great weight of authority in Virginia, New York, Iowa, Minnesota, Missouri, Maryland, Massachusetts, and New Jersey hold in accordance with the passage above quoted from 24 W. Va., in regard to assuming the risks and perils incident to the employment; and we must hold that, by continuing in the employment of the defendant after he had every opportunity of becoming acquainted with its dangers, he assumed the risks incident thereto.

THE conclusion of the court is in harmony with the leading case of Carbine v. Bennington, (Vt., 1889), which is reported in 29 Cent. L. J. 10, with an exhaustive note.

DECREE—VACATION FOR FRAUD—BRIBERY OF WITNESS.—In Pico v. Cohn, 25 Pac. Rep. 970, the Supreme Court of California decide that a decree will not be vacated merely because the prevailing party obtained it by bribing a witness to swear falsely. Beatty, C. J., says:

It is averred, and we think sufficiently shown, that upon proof of these facts there is a reasonable certainty that plaintiff would upon another trial gain his cause. Such being the case, is plaintiff entitled to a decree vacating and annulling the former decree on the ground that it was procured by fraud? After a careful and extended examination of the authorities, we are constrained to answer this question in the negative. That a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the question examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat or, being regularly employed, corruptly sells out his client's interest. U. S. v. Throckmorton, 98 U. S. 65, 66, and authorities cited. In all such instances the unsuccessful party is really prevented by the fraudulent contrivance of his adversary from having a trial; but when he has a trial he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that necessarily the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and he likewise fails to show the injustice that has been done him, on motion for a new trial, and the judgment is affirmed on appeal he is without remedy. The wrong, in such case, is, of course, a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless ligitation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for, if this could be done once, it could be done again and again, *ad infinitum*. But counsel for appellant seek to distinguish this case from those in which it has been held that a judgment will not be set aside by reason of its being based upon forged documents or perjured testimony. They say that the fraud committed by Cohn was the bribing of Johnson; that this was collateral and extrinsic; that is was not, and could not have been the subject of investigation at the trial of the original action. We do not think this distinction can be maintained. The fraud which Cohn committed was the production of perjured evidence in support of his defense. The

means by which he induced the witness to swear falsely was but an incident. It may be safely asserted that a witness does not often deliberately perjure himself without being induced thereto by some fraudulent or corrupt practice on the part of him who gets the advantage of the perjury. It is a matter of indifference what particular form such corrupt practice takes. The evil and the wrong is in the perjury which follows. In this case the truth of Johnson's evidence was necessarily drawn in question at the trial, and determined by the decision of the court; and all that has since been discovered is another item of testimony bearing on that point. We cannot find any substantial ground upon which this case can be distinguished from U. S. v. Throckmorton, *supra*. The decision in that case has been approved by this court as recently as *In re* Griffith, 85 Cal. 113, 23 Pac. Rep. 528 and 24 Pac. Rep. 381. The following decisions of this court are also in point: Allen v. Currey, 41 Cal. 321; Mining Co. v. Mitchell, 59 Cal. 176. Many other authorities to the same effect are cited in the brief for respondents. On the other hand, the case of Laithe v. McDonald, 7 Kan. 254, 12 Kan. 340, directly supports the position of appellant, as does the case of Fabrilius v. Cock, 3 Burrows, 1771. The cases of Verplanck v. Van Buren, 76 N. Y. 247, and Dringer v. Railway Co., 42 N. J. Eq. 573, 8 Atl. Rep. 811, contain expressions which seem to imply the same doctrine, but they do not directly support it.

DEFENSES TO MUNICIPAL AID BONDS.

Though the subject presented has not now the practical interest it at one time possessed, owing to the modern disinclination, on the part of municipalities, to enter into obligations which were at one time so common, but which experience taught were, in most instances, simply ruinous, and without benefit either to the municipality or the community, the issue of municipal aid bonds by counties and cities still continues in some States; and therefore a review of the main features of the law by which they are governed, and the defenses which may be interposed in their behalf, may be of some value. By way of preface, it may be said that, in this paper, we shall treat simply of what is known, in general parlance, as railroad aid, or municipal aid bonds. Though many phases and features of the law pertaining thereto will apply equally as well to other kinds of municipal bonds issued for purposes of credit or of obtaining loans, the subject of railroad aid bonds, or bonds issued by a municipal corporation to assist the building of railroads, and to pay for stock of such railroad, is one peculiar to itself, and has been hedged about with rules, and governed by considerations not generally accorded to ordinary municipal bonds.

Power to Issue. — In the first place, it may be said that the power, in the absence of special authority, of a municipal corporation to aid the construction of railroads by subscribing to their stock, is sustained in a large number of cases in the different States, and the federal courts,[1] though in many of the States such power is not recognized by the courts.[2] It is elementary, however, that the legislature of a State, in the absence of constitutional inhibition,[3] has power to authorize municipalities to become shareholders in railroad companies, and to issue bonds therefor.[4] But the doctrine is universal that municipal corporations have no general or implied power to issue commercial paper,[5] in which category municipal bonds are properly classed. In other words, a municipal corporation has no incidental or inherent authority, under the usual grants of municipal power, as a means of discharging its ordinary functions, to issue negotiable securities. Such authority, however, may be inferred from special and extraordinary powers, and may depend, in some measure, upon a true construction of its charter, and the legislation of the State applicable to it.[6]

[1] Olcott v. Supervisors, 16 Wall. 678; Sharpless v. Mayor, 21 Pa. St. 147, s. c., 59 Am. Dec. 759; Leavenworth v. Miller, 7 Kan. 479, s. c., 12 Am. Rep. 425; Phillips v. Albany, 28 Wis. 340; Butler v. Denham, 27 Ill. 474; Gould v. Venice, 29 Barb. 442; 7 Lawson's Rights and Remedies, § 3947. Counties and towns in Illinois have not the right to make bonds, issued in aid of railroads, payable in the City of New York. People v. Tazewell, 22 Ill. 147.

[2] Hanson v. Vernon, 27 Iowa, 28, s. c., 1 Am. Rep. 215; People v. Salem, 20 Mich. 452, s. c., 4 Am. Rep. 400; M. O., etc. R. R. Co. v. Mayor, 23 Ark. 300; Aurora v. West, 22 Ind. 88, s. c., 85 Am. Dec. 413.

[3] Cole v. City of La Grange, 20 Cent. L. J. 209; Harshman v. Bates County (U. S. S. C.), 3 Cent. L. J. 367.

[4] Johnson v. Stark, 24 Ill. 75; Perkins v. Lewis, 24 Ill. 208; Keithsburg v. Frick, 34 Ill. 405; Bank of Rome v. Rome, 18 N. Y. 38; Grant v. Courter, 24 Barb. 232; Clark v. Rochester, 24 Barb. 446; Sharpless v. Philadelphia, 21 Pa. St. 147, s. c., 59 Am. Dec. 759; Commonwealth v. Taylor, 36 Pa. St. 263; Commonwealth v. Perkins, 43 Pa. St. 400. An authority to a city corporation to subscribe for stock in a railway company "as fully as any individual," authorizes also the issue by the city of its negotiable bonds in payment of the stock. Seybert v. Pittsburg, 1 Wall. 272; Commonwealth v. Pittsburg, 43 Pa. St. 391.

[5] Merrill v. Town of Monticello, 16 Cent. L. J. 90; Hopper v. Town of Covington, 8 Fed. Rep. 777; Ryan v. City of Watertown, 30 Wis. 259. Even the legislature has no power to authorize a municipal corporation to issue its bonds to a private manufacturing corporation. Cole v. City of La Grange (U. S. S. C.), 20 Cent. L. J. 209.

[6] Gause v. City of Clarksville, 5 Dillon C. C. Rep. 165, 8 Cent. L. J. 358.

Effect of Absolute Want of Power. — If the power to issue bonds in aid of railway and other like public enterprises does not in fact exist, they are void, into whosoever hands they may come.[7] This results from the fact that municipal bonds payable to bearer are negotiable instruments, and subject to the same rules as other negotiable paper,[8] among which is the one that a *bona fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin; the only exceptions being where the paper is absolutely void, for want of power in the maker to issue it, or where the circulation is prohibited by law for the illegality of the consideration.[9] Therefore, there must be an original authority by statute to the municipality to issue bonds. As said by Mr. Justice Clifford, in the leading case on the subject: "Bonds payable to bearer issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation which possessed no power from the legislature to grant such aid, they are invalid even in the hands of innocent holders."[10] Thus, wherever a want of power exists, a purchaser of securities is chargeable with notice of it, if the defect is disclosed by the corporate records or by other records, where the power is required to be shown.[11] Thus where bonds, purporting to have been issued by a county, contain no recitals of an election or of proproceedings and orders of the county board, but are naked promises to pay, every purchaser and holder of the securities, is chargeable with notice of whatever appears upon the face of the county records; and if, in such case, it appears upon the face of such records that the officers had no authority or power to issue the bonds, the county may avail itself of that want of authority as a defense to an action even of a *bona fide* holder.[12]

Where bonds recite on their face that they are "funding bonds," and issued to fund the town's indebtedness, purchasers assume, at their peril, that the legislature had authorized the issue of bonds for that purpose.[13] And in another case, bonds of a city issued as appears on their face, pursuant to an act of the legislature, to a private manufacturing corporation, were held to be void for want of constitutional power in the legislature, even in the hands of a purchaser in good faith for value.[14] If, on the other hand, the power exists in the municipality to issue bonds, a false recital of such power on the bonds themselves will not vitiate them in the hands of an innocent holder.[15]

Power Must be Strictly Pursued. — The power, when it has been conferred to aid or engage in extramunicipal enterprises, being extraordinary in its nature, and burdensome to the citizen, must (except as modified by the doctrine of estoppel in favor of the *bona fide* holder hereafter referred to) be strictly pursued according to the terms and conditions of the grant conferring it.[16] Thus, in a case where a county had by the legislative act no authority to issue its bonds to the railroad company unless upon the sanction of a previous vote, after thirty days notice of the

[7] Marsh v. Fulton County, 10 Wall. 676; Sherrard v. Lafayette County, 2 Cent. L. J. 347; Harshman v. Bates County, 92 U. S. 569, 3 Cent. L. J. 367; County v. McKenzie, 94 U. S. 660; Township v. Skinner 94 U. S. 255; Ogden v. County of Daviess, 102 U. S. 634; Hayes v. Holly Springs, 114 U. S. 120.

[8] Cromwell v. Sac, 96 U. S. 51, s. c., 6 Cent. L. J. 209.

[9] Cromwell v. Sac, *supra*.

[10] Knox County v. Aspinwall, 21 How. 539.

[11] Allen v. Louisiana, 103 U. S. 80.

[12] Lewis v. Commissioners, 12 Kan. 186, 1 Cent. L. J. 16. Where negotiable commercial securities are issued and negotiated before there is any decision by the courts of the State against the validity of the act authorizing their issue, the Supreme Court of the United States does not consider itself bound to follow a subsequent decision of the local courts invalidating such securities, but will decide for itself whether under the constitution and laws of the State such securities are valid or not. Westerman v. Cape Girardeau County, 7 Cent. L. J. 353; Gelpecke v. Dubuque, 1 Wall. 175; Butts v. Muscatine, 8 Wall. 575. But in cases depending upon the constitution or statutes of a State, the Supreme Court of the United States adopts the construction of the constitution or statutes given by the courts of the State, when that construction can be ascertained, and when different and conflicting interpretations have not been made by the State courts. Fairfield v. County of Gallatin, 9 Cent. L. J. 467; Polk's Lessees v. Wendell, 9 Cranch. 98; Nesmith v. Sheldon, 7 How. 818; Walker v. State Harbor Commissioners, 17 Wall. 651.

[13] Merrill v. Town of Monticello (U. S. C. C. Ind.), 16 Cent. L. J. 90.

[14] Loan Assoc. v. Topeka, 20 Wall. 655; and see also Parkersburg v. Brown, 106 U. S. 487; Allen v. Jay, 60 Me. 124; Lowell v. Boston, 111 Mass. 454; English v. People, 96 Ill. 566; Central Branch v. Smith, 23 Kan. 745.

[15] Smith v. Clark County (Mo.), 1 Cent. L. J. 5; Crane v. Lessee, 6 Peters, 598.

[16] Starin v. Genoa, 23 N. Y. 439; Woods v. Lawrence County, 1 Black, 386; Gould v. Sterling, 23 N. Y. 456; Harding v. Rockford R. R. Co., 65 Ill. 90; Williams v. Roberts, 88 Ill. 11; 1 Dillon on Mun. Corp. § 163.

election to be held for that purpose, the Supreme Court of Illinois held, in a direct proceeding against the county to enjoin it from issuing its bonds, that although there was an election at which a majority voted in favor of the subscription, yet the failure to give the thirty days notice was a fatal defect, and the issue of the bonds was restrained.[17]

Estoppel From Defenses.—But as against innocent and *bona fide* holders for value of such securities, the municipalities may be estopped by recitals in the bonds, by the subsequent levy of taxes to pay interest thereon, or by retaining the stock which was received in exchange for the bonds or purchased with their proceeds, to set up in defense a noncompliance with preliminary conditions.[18] This doctrine of estoppel has been established by repeated decisions of the United States Supreme Court, which has always watched with jealous care the interests of innocent holders of municipal bonds,[19] and has been followed by the State courts generally.[20] The doctrine proceeds, also, upon the ground that such bonds are commercial paper, and in the hands of an innocent holder have the same protection.[21] Thus, when a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which gave the requisite authority, and no more liable to be impeached in the hands of such a holder than any other commercial paper.[22] All these decisions are in substance, that the mere irregularities of officers in endeavoring to comply with the provisions of statute giving the power, where the recitals in the bonds are in proper form, and do not convey notice of such irregularities, will not invalidate the bonds in the hands of *bona fide* holders.

Who is Bona Fide Holder?—The question as to who is a *bona fide* holder of a municipal bond is very much the same as in cases of ordinary commercial paper. One who purchases bonds in open market, supposing them to be valid and having no notice to the contrary, will be deemed a *bona fide* holder.[23] In one case a holder of bonds the city of Ottawa, knowing that they were issued to aid a manufacturing company in the development of the water power of the city, which was not a corporate purpose within the meaning of the constitution of Illinois, is not a *bona fide* holder, and the bonds as to him are void.[24]

Defects Cured by Estoppel.—As to what constitutes mere irregularities of officers within the rule, has given rise to considerable discussion and some conflict between the courts. It is clear and well established that an election without notice,[25] or upon insufficient notice,[26] or one in which the the requisite majority is not obtained, or at which disqualified voters are allowed to vote—in other words, mere formal defects are contemplated.[27] So, also, formal defects or irregularities by officers in the execution of the bonds, not apparent on their face.[28] But, in some cases, the question was debated with considerable vigor, whether the acts of the officers, required as a condition precedent to the issue of the bonds, were of such character as that absolute default on their part to comply therewith defeated the bonds, upon the ground of a lack of inherent power to issue. As an example, the question arose whether a total absence to hold any election, where one is required to be held, will vitiate the bonds.[29] In one of the earlier cases, where the county commissioners were by statute authorized to issue bonds upon a previous affirmative vote of the electors, and the bonds were issued, though no such vote was in fact held, the court decided that, the bonds

[17] Harding v. Rockford, etc. R. R. Co., 65 Ill. 90.

[18] Knox County v. Aspinwall, 21 How. 539.

[19] Township v. Rogers, 16 Wall. 644; Grand Chute v. Winegar, 15 Wall. 355; Lynde v. Winnebago County, 83 U. S. 6; Township v. Morrison, 10 S. C. Rep. 333; Kimball v. Town of Lakeland, 41 Fed. Rep. 289, 29 Am. Law Reg. (N. S.) 380, note.

[20] Smith v. Clark County, 1 Cent. L. J. 5; 7 Lawson's Rights and Remedies, 6217 and cases cited in note.

[21] Cromwell v. Sac Co., 96 U. S. 51.

[22] City of Lexington v. Bullen, 13 Wall. 296; Knox County v. Aspinwall, 21 How. 539; Gelpecke v. City of Dubuque, 1 Wall. 175; Smith v. Clark County, 1 Cent. L. J. 5.

[23] Galveston H. and H. R. R. Co. v. Cowdrey, 78 U. S. 459.

[24] City of Ottawa v. Carey, 108 U. S. 10.

[25] Knox County v. Aspinwall, 62 U. S. 539.

[26] Marshall County v. Schenck, 72 U. S. 772.

[27] City of Lexington v. Butler, 81 U. S. 282; Thompson v. Perrine, 103 U. S. 806.

[28] Weyanwega v. Ayling, 99 U. S. 112; Ralls County v. Douglas, 105 U. S. 728. But see McClure v. Oxford Township, 94 U. S. 429; Anthony v. County of Jasper, 101 U. S. 693; Cole v. City of Cleburne, 131 U. S. 162, where the defects of execution were held of such character as to charge the purchaser with notice.

[29] Smith v. Clark County, 1 Cent. L. J. 5; Grand Chute v. Winegar, 15 Wall. 355; Marsh v. Fulton County, 10 Wall. 676.

containing no recital, the *bona fide* holder had no right to presume that they were issued under the circumstances which gave the requisite authority, and that he was bound to take notice of the county records, which showed that no authority existed.[30] But the difficulty in that case arose from the fact that there was no recital in the bonds. When such recital exists, it has been held conclusive against the municipality, even where there there has been absolute default on the part of the officers to comply with the conditions precedent.[31] The doctrine may be stated thus, that where the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further for evidence of the conditions of the grant of power, and that when the board, or the records of the municipality contain a recital of an election, and all other conditions precedent as prescribed by the statute, the municipality is concluded by that recital, and may not show that, as a matter of fact, no election took place.[32] The discussion of this general question caused, at one time, some conflict between the federal and State courts as to whether a *bona fide* purchaser generally is chargeable with notice of defect or irregularity which is disclosed by the county records; or, in other words, whether he must look beyond the recital of the bond. The federal courts, as stated, held the municipality concluded by the recital in the bonds.[33] The State courts, on the contrary, declared the bondholder chargeable with notice of whatever appears upon the county records, notwithstanding recitals.[34] Both, however, as stated, agreed that where there are no recitals on the face of the bond, and the want of authority appears on the county records, the bonds are void even in the hands of a *bona fide* holder.

LYNE S. METCALFE, JR.

St. Louis.

[30] Marsh v. Fulton County, 10 Wall. 676.

[31] Grand Chute v. Winegar, 15 Wall. 355.

[32] Bissell v. City, 24 How. 287; Grand Chute v. Winegar, *supra*.

[33] Grand Chute v. Winegar, *supra*; Town of Colona v. Evans, 3 Cent. L. J. 325; Township v. Rogers, 16 Wall. 644; Pollard v. City of Pleasant Hill, 1 Cent. L. J. 155.

[34] Flagg v. City of Palmyra, 33 Mo. 440; Clark v. City of Des Moines, 19 Iowa, 199; Smith v. Clark County, 54 Mo. 58; Lewis v. Commissioners (Kan.), 1 Cent. L. J. 16; Veeder v. Town of Luna, 19 Wis. 280; Starin v. The Town of Genoa, 23 N. Y. 439.

STOPPAGE IN TRANSITU—DELIVERY, ACTUAL OR CONSTRUCTIVE.

KINGMAN V. DENISON.

Supreme Court of Michigan, Feb. 27, 1891.

A consignee of goods became insolvent before their arrival, and when they were delivered by the carrier his store was in possession of his mortgagees. The mortgaged property was subsequently sold, and bid in by one of the mortgagees, who sold part of the goods in question. The consignors remained ignorant of the true state of affairs for two months, when they replevied the portion of the goods remaining unsold in the hands of the mortgagee: *Held* that, as the goods had never actually come into the possession of the consignee, the consignors could assert their right of stoppage *in transitu* as against the mortgagee; that this right was not divested by the purchase of the goods at the mortgage sale; and that the mortgage lien would not attach to the goods, as against the consignors, even under a clause in the mortgage conveying after-acquired property.

LONG, J.: On July 8, 1889, defendant Denison wrote the plaintiffs at Peoria, Ill., ordering 5,000 pounds of twine. No dealings had ever been had between the parties prior to that time. The plaintiffs received the letter the next day, and at once wrote Denison: "We have entered your order, and twine will go forward to-morrow." On July 11th the twine was shipped to W. C. Denison, Grand Rapids, Mich., plaintiffs taking shipping bill from the railroad company there, and on same day sent it to Denison, with statement of account for value of the twine. The twine was received at Grand Rapids by the Grand Rapids & Indiana Railroad Company, July 17th, and on the 18th they turned it over to a teamster, who delivered it at the store which was occupied by Denison at the time the order was made. It appears that on July 9th the Grand Rapids Savings Bank caused an attachment to be levied upon Denison's property. On that evening Denison gave the bank a chattel mortgage on all the goods in the store and at a warehouse there, and a store situate at another place outside of Grand Rapids. July 10th, 11th, and 12th he gave mortgages on the same property to the bank and several other creditors, two of them being given to the defendant the McCormick Harvesting Machine Company. The goods mortgaged were held in the store by the agents of the bank until they were sold under one of the mortgages, which was about July 18th, at which time the defendant the McCormick Harvesting Machine Company bid the goods in, and continued to occupy the store, putting Mr. Denison in as their agent. The McCormick mortgage contained a clause, after a description of the property mortgaged, as follows: "And all additions to and substitutes for any and all the above-described property." On September 7th plaintiffs, who had no notice or knowledge of the changed condition of Mr. Denison's affairs, drew on him at sight for the amount of the bill. This draft was not paid, and on September 14th plaintiffs wrote him for prompt remittance, which

was not made. On September 19, 1889, plaintiffs brought replevin against the defendants, for the twine, finding about one-half of it; the balance having been sold out of the store] by the McCormick Harvesting Machine Company. On the trial of the cause the defendants waived return of the property, and had verdict and judgment against the plaintiff for $351. 91, the value of the twine taken, and costs. Plaintiffs bring error.

The plaintiffs asked the court to instruct the jury that plaintiffs were entitled to a verdict; and in the ninth request asked an instruction that "if Mr. Denison did not in fact receive the twine at his store, but was not there when it was delivered, and never received and accepted it for his use in any way, except that, finding it in the store, he allowed the mortgagees to assume control of it, plaintiffs could retake it as against him." And in the tenth request it was asked that the jury be instructed that the McCormick Company, as mortgagee, is in no better position than Mr. Denison. Its mortgage does not cover this twine, nor is it a *bona fide* purchase. Several requests were also asked for instructions to the jury relating to the insolvency of Mr. Denison at the time of the purchase, and his intent not to pay for the twine at the time of its purchase, or at the time when it was received at the store, on the 18th of July. These last-named requests we do not deem it necessary to set out here for an understanding of the points involved. The requests set out were refused by the trial court, and upon such ruling the plaintiff assigns error. The court, in its charge to the jury, stated: "Plaintiff claims the right to the possession of these goods at the time this suit was commenced—First, because they were ordered by Mr. Denison at a time when he was insolvent, and had no intention, or at least no reasonable expectation, of paying for them according to the terms of the contract; and counsel also claim the right of stoppage in transit. All I need to say in regard to the latter claim is that I think the right of stoppage in transit, under the facts in this case as shown by the evidence, has no application whatever; there is no such right existing." This part of the charge relating to the right of stoppage in transit is assigned as error. The court was in error in refusing these requests to charge and in the charge as given. It is not seriously contended here but that under the evidence given on the trial, the defendant Denison was insolvent at the time the goods were ordered. At least this was a question of fact which should have been submitted to the jury; and, if so found, the question of the right of stoppage in transit was an important question in the case. The right of stoppage in transit is a right possessed by the seller to reassume the possession of goods not paid for while on their way to the vendee, in case the vendee becomes insolvent before he has acquired actual possession of them. It is a privilege allowed to the seller for the particular purpose of protecting him from the insolvency of the consignee. The right is one highly favored in the law, being based upon the plain reason of justice and equity that one man's property should not be applied to the payment of another man's debts. Gibson v. Carruthers, 8 Mees. & W. 337. But it is properly exercised only upon goods which are in passage and are in the hands of some intermediate person between the vendor and vendee in process, and for the purpose of delivery, and this right may be exercised whether the insolvency exists at the time of the sale or occurs at any time before actual delivery of the goods, without the knowledge of the consignor. O'Brien v. Norris, 16 Md. 122; Reynolds v. Railway Co., 43 N. H. 580; Blum v. Marks, 21 La. Ann. 268; Benedict v. Scaettle, 12 Ohio St. 515. This right of stoppage in transit will not be defeated by an apparent sale, fraudulently made, without consideration, for the purpose of defeating the right. There must be a purchase for value without fraud, to have this effect. Harris v. Pratt, 17 N. Y. 249. In the present case it appears that the goods arrived in Grand Rapids, July 17th, and were taken to the store on the 18th. Mr. Denison was not in the store at the time they were taken in. Mr. Talford was in possession of all the goods and of the store at this time for all the mortgagees, and after the sale under the mortgage the McCormick Company took possession, and were in possessson at the time this replevin suit was commenced. The testimony tends to show that at the time demand was made upon the McCormick Company and Mr. Denison for the twine Mr. Denison stated that he thought the plaintiff, having heard of his financial affairs, would not ship the twine, and that he did not know it had been shipped until it was in the store; and he was very sorry it had come, under the circumstances. The McCormick Company claimed that by the terms of their mortgage they were entitled to hold it. The court was in error in not submitting to the jury the question whether the goods had come actually to the possession of Mr. Denison. The circumstances tend strongly to show that he never had actual possession of them, and never claimed them as owner. He had made the order, and was notified that they would be shipped; but from that time forward it is evident that he made no claim to them. The McCormick Company claimed that they passed to them under the terms of their mortgage. They, however, stood in no better position than Denison. If the goods never actually came into the possession of Denison as owner, the mortgage lien would not attach, even under the clause in the mortgage covering after-acquired property. They do not stand in the position of *bona fide* purchasers of the property. The right of stoppage could not be divested by a purchase of the goods under the mortgage sale. The transit had not ended unless there was actual delivery to Mr. Denison. These were questions of fact for the jury, which the court refused to submit. If the jury had found that Denison was insolvent at the time the order

was made, or became insolvent at any time before the claimed delivery of the goods, and that the goods were never actually delivered to the possession of Mr. Denison, then the vendors' rights would have been paramount to any right which the McCormick Company could have acquired at the mortgage sale. Underhill v. Booming Co., 40 Mich. 660; Lentz v. Railway Co., 53 Mich. 444, 19 N. W. Rep. 138; White v. Mitchell, 38 Mich. 390; James v. Griffin, 2 Mees. & W. 623. In the view we have taken of the case, we think the other questions raised are unimportant, and we will not pass upon them. The judgment of the court below must be reversed, with costs, and new trial ordered. The other justices concurred.

NOTE.—This right, which the unpaid vendor has to an extension of his lien on the goods sold for the price thereof before they come into the actual or constructive possession of his insolvent vendee, was, perhaps, first recognized by the equity courts. Lords Hardwicke and Mansfield and Judges Heath and Grose claimed that it is a strictly legal right; but that view has not been accepted by any of the courts of this country. The right is not consistent with the principles of the common law regarding sales, and the American judges have from the beginning recognized it as an equitable right adopted and enforced as a rule of law. It arises solely on the solvency of the buyer (D'Aquilla v. Lambert, 2 Eden, 77), and is enforced against those only who have an inferior equity. Lickbarrow v. Mason, 33 Geo. 3; Newhall v. Central Pacific R. Co., 51 Cal. 345; Lee v. Kimball, 45 Me. 172. It is founded on the supposition that the property has passed to the vendee, and that the actual possession is in a third person. But the exercise of the right does not rescind the contract of sale; it only enables the vendor to repossess himself of the goods and thereby resume his lien until the price is paid.

The right of stoppage may be exercised by any vendor upon the subsequent discovery of the insolvency of his vendee existing at the time of the sale, as well at his becoming insolvent after the sale. It is not defeated by existing insolvency, if the vendor was not aware of such insolvency. Farrell v. Richmond R. Co. 9 S. E. Rep. 302; Reynolds v. Railroad Company, 43 N. H. 589; Schwabacher v. Kane, 13 Mo. App. 126; Loeb v. Peters, 63 Ala. 243; O'Brien v. Norris, 16 Md. 122. But the vendor who sold to an insolvent vendee, knowing that he was insolvent, cannot exercise this right to repossess himself of the goods until they are paid for. Blum v. Marks, 21 La. Ann. 268. In Finkhauser v. Fellows, 21 Pac. Rep. 886, a witness for the plaintiff testified that he and the plaintiffs always knew that the consignee was insolvent, but that they trusted to his honor and not his solvency, believing that he would pay, as he had always previously done it, and it was held that "the plaintiffs could not reclaim the goods by right of stoppage *in transitu* after they had been attached, as it is essential to the exercise of that right that the assignor shall learn of the consignee's insolvency after the goods are shipped."

The vendor need not be entirely unpaid. If he has received part payment he may still exercise the right of stoppage for the balance. Feise v. Wray, 3 East, 75; Hodgson v. Log, 7 T. R. 40; Newhall v. Vargas, 13 Me. 93. But the right belongs only to one who sells on credit. Groyn v. Railroad Company, 85 N. Car. 427; De Wolff v. Lindell, L. R. 5 Eq. 209; Phillips v. Dickson, 8 C. B. N. S. 391; Ober v. Smith, 78 N. C. 313; Chandler v. Fulton, 10 Tex. 2; Knilock v. Craig, 3 T. R. 783; Van Castel v. Booker, 13 L. J. Exch. 17; Jenkins v. Jurrett, 70 N. C. 255. If the vendor takes the acceptance of a third party, it follows that he has no right to stop the goods until he is likely to lose by the insolvency of such third party. But he will not relinquish his right by receiving conditional payment in the form of notes or bills of exchange drawn by the vendee. And this is true even though he may have negotiated the paper and it is outstanding in the hands of third parties. Bell v. Moss, 5 Whart. (Ga.), 189; Arnold v. Delano, 4 Cush. 53; Edwards v. Brewer, 2 M. and W. 375; Donath v. Bromhead, 7 Pa. St. 301; Hays v. Monille, 14 Pa. St. 148. Neither will a wrongful delivery of the goods by the carrier to a party not entitled to receive them destroy the right to stop. Kitchen v. Spear, 30 Vt. 545; see also Lentz v. Railroad Company, 53 Mich. 444.

The power to thus stop goods is extended to all who stand in the situation and sustain the character of vendors. Naylor v. Dennie, 8 Pick. 198; Lane v. Jackson, 5 Mass. 162; Buckley v. Furness, 15 Wend. 144. It may therefore be exercised by vendors, and also by those who stand in the relation of vendors, as where one pays the price of goods purchased by a vendee and takes from such vendee an assignment of the bill of lading as security for his advances. Muller v. Ponder, 55 N. Y. 325; Seymour v. Newton, 105 Mass. 275.

It has been repeatedly stated by the courts that the assignment of the bill of lading by the consignee or vendee of the goods is the only way of defeating the vendor's right. Mr. Benjamin, in his work on Sales, says the right is defeated in this one way only; and Judge Redfield says: "We are not aware that the right can be defeated in any other mode until the goods come to the virtual possession of the vendee." It is well settled, however, that his right of stoppage may be divested before the termination of the *transitus* by the assignment of the bill of lading. Upon the completion of the bargain of sale the vendee acquires the general right of property, subject to the vendor's right of stoppage in case of insolvency. This right of property the vendee may transfer without any documentary evidence of possession on his part, or of delivery to his vendee, but he can transfer no greater right than he himself has. He therefore cannot make a complete transfer of the goods unless he has a bill of lading indorsed in blank, or indorsed to him personally, or in which he is named as the person to receive the goods. Stanton v. Eager, 16 Pick. 467; Tucker v. Humphrey, 4 Bing. 516. That a *bona fide* sale of the property for a valuable consideration, accompanied with an assignment and delivery of the bill of lading terminates the right, was established by Lickbarrow v. Mason, which bears the same relation to the law of stoppage *in transitu* that Coggs v. Barnard does to the law of common carriers. In Newhall v. Railroad Company the court supported this doctrine when it was shown that the vendee was insolvent and the vendor had notified the carrier to stop the goods before the sale and transfer of the bill of lading, neither of these facts being known to the transferee of the bill. But the goods must be actually sold, though the transfer may be to pay an antecedent debt, for where the assignment of the bill is made merely as collateral security in which nothing is surrendered or advanced by the assignee, the right will still exist. Rosenthal v. Dessan, 11 Hun, 49; Lessassier v. Railroad Company, 2 Woods, 3; Loeb v. Peters, 63 Ala.

243. Not only must the bill of lading be indorsed to the sub-vendee for a valuable consideration and in furtherance of a *bona fide* contract to confer an interest in the goods (Patten v. Thompson, 5 M. and S. 350), but to defeat the right of stoppage the transferee must have taken the bill without knowledge of circumstances that renders it not fairly and honestly assignable. Wright v. Campbell, 4 Bur. 2051; Ilisly v. Stubbs, 9 Mass. 65; Evans v. Martlett, 1 Ld. Ray, 271.

The limitation of the exercise of this power is to the actual or reasonably expected insolvency of the vendee. But the fact of insolvency and not the act will govern. If the vendee is unable to meet his liabilities as they mature in the ordinary course of business the right may be exercised, for it is not necessary that the buyer should have been proceeded against by a creditor under an insolvent law. Gustine v. Phillips, 38 Mich. 674; Secomb v. Nutt, 14 B. Mon. 324; Hays v. Monille, 14 Pa. St. 48; Loeb v. Peters, 63 Ala. 243; Clapp v. Sohmer, 56 Iowa, 273. Lord Stowell said in the case of The Constantia: "It is not an unlimited power which is vested in the consignor to vary the consignment at his pleasure. It is a privilege allowed to the seller to protect him against the insolvency of the consignee. But certainly it is not necessary that the person should be insolvent at the time the order to stop was given. If the insolvency happens before the arrival it would be sufficient, I conceive, to justify what has been done, and to entitle the shipper to the benefit of what has been done."

The right of stoppage may be said to be one arising out of the very contract by which the vendee claims the goods, and it therefore cannot be superseded by an attachment at the suit of a general creditor levied while goods are *in transitus*. Farrell v. Railroad Company, 9 S. E. Rep. 302; Schuster v. Carson, 44 N. W. Rep. 734; Morris v. Shryock, 50 Miss. 590; Newhall v. Vargas, 15 Me. 34; Clark v. Lynch, 4 Daly (N. Y.), 83; Kitchen v. Spear, 30 Vt. 535; Callahan v. Babcock, 21 Ohio St. 281; Seymour v. Newton, 105 Mass. 272; Rucker v. Donovin, 13 Kan. 251; Woodruff v. Noyes, 15 Conn. 335; Benedict v. Schaettle, 12 Ohio St. 515; Cox v. Burns, 1 Clarke (Iowa), 64; Hause v. Judson, 4 Dana (Ky.), 8; Aguire v. Parmilee, 22 Conn. 473; Moore v. Lott, 13 Nev. 376; Mason v. Wilson, 43 Ark. 172; O'Neill v. Garnett, 6 Iowa, 480; Inslee v. Lane, 57 N. H. 454; Railroad Company v. Painter, 15 Neb. 294; Cement Company v. O'Brien, 123 Mass. 12; Blackman v. Pierce, 23 Cal. 508; Estey v. Truxel, 25 Mo. App. 238. On the same principle the levy of an execution will not defeat the vendor's right to stop. Covell v. Hitchcock, 23 Wend. 611. Of course if the attaching creditor has paid the freight the vendor must repay it before he will have a right to retake the goods. Langstaff v. Stix, 64 Miss. 171; Rucker v. Donovan, 13 Kan. 251; Greve v. Dunham, 60 Iowa, 108. And if the freight has not been paid the carrier can hold the goods until it is paid, but not till he is paid a general balance due him from the consignee. Oppenheim v. Russell, 3 B. and P. 42; Jackson v. Nichol, 5 Bing. (N. C.) 508. That question was considered in Pennsylvania Railroad Company v. American Oil Works, 17 Atl. Rep. (Pa.) 671, and it was held that the carrier had no right, as against a vendor who has exercised the right of stoppage *in transitu*, to retain the goods until arrearages due by the consignee in preceding shipments had been paid, even though a provision in the bill of lading gave him the right to so retain them.

Only while the goods are *in transitus* may they be stopped, and hence the important questions in this connection are: What is the nature of the *transitus* in which the goods may be stopped? and when are the goods in such *transitus*, or when has that *transitus* ended? Lord Mansfield says in Stokes v. La Riviere, 3 East, 394, that "the goods may be stopped in every sort of *transitus* to the hands of the buyer." Ships in harbor, carriers and bills may be stopped. It makes no difference whether the goods are in motion or not, for if they are in the hands of one who holds them as agent to forward they are as much *in transitus* as if they were actually moving. The simplest case of the termination of the transit is where the goods have passed into the actual possession of the vendee, but actual possession is not necessary to defeat the vendor's right. In the law of stoppage *in transitu* the vendee is said to be possessed when the transferrer has changed his character from that of carrier to that of bailee, or the transferee has exercised some act of ownership or control over the property, or it has come into his actual possession. Mr. Story says: "In all cases, however, where the goods remain in the hands of a carrier, the circumstances must distinctly show that he holds them in a new character as special bailee of the custody," and in Harris v. Pratt, 17 N. Y. 249, it was held that "the transit continues until the goods come to the possession of the vendee, or of some agent authorized to act in respect to the disposition of them otherwise than as forwarder for the vendee." But while it is well settled that the *transitus* is not at an end so long as the carrier continues to hold the goods as a carrier, it is ended when, by agreement between himself and the consignee, the carrier undertakes to hold the goods for the consignee, but as his agent. The same principle will, of course, apply to warehousemen. Clapp v. Peck, 95 Iowa, 270; Reynolds v. Railroad Company, 43 N. H. 580; Whitehead v. Anderson, 9 M. & W. 518; Inslee v. Lane, 57 N. H. 454; Coventry v. Gladstone, L. R. 6 Eq. 44; Powell v. Kechnie, 3 Dak. 319; McFetridge v. Piper, 40 Iowa, 627. Such an agreement may be entered into even though the carrier intends to hold the goods until his lien upon them for carriage is satisfied. Allen v. Gripper, 2 C. & J. 218; Hallos v. Dimond, 63 N. H. 565. Lord Mansfield, in Wright v. Lowes, 4 Esp. 82, says: "All that is necessary is that the vendee should exercise some right of ownership over the property," and that he may clearly do without taking actual possession of it. If he, for instance, pays the freight on the goods and receipts for them, but leaves them in the depot to be called for, the transit is at an end, and they are no longer subject to the vendor's right. Langstaff v. Stix, 64 Miss. 171. The transit was not considered to be ended where the goods were removed by the carrier and placed in its warehouse in its capacity as carrier, to await the payment of freight charges and the delivery to the vendee (Syms v. Scholten, 35 Kan. 310); where the vessel had merely arrived at the wharf without the goods being taken out of the hold (Tucker v. Humphrey, 4 Bing. 516); where the warehouseman who was holding the goods had received them as the agent of the carrier (Hoover v. Tibbets, 13 Wis. 89); where they were taken from a carrier by an agent who was held to not have sufficient authority from his principal (Tufts v. Sylvester, 9 Atl. Rep. 357; Caban v. Campbell, 6 Casey (Pa.), 254; Harris v. Pratt, 17 N. Y. 249; Bolin v. Huffnagle, 7 Rawle (Pa.), 9; Buckley v. Furniss, 15 Wend. 137); where the carrier had promised to deliver as soon as the goods could be got at but no actual delivery had been made. Coventry v. Gladstone, *supra*. But where goods were landed at a wharf, and no duty was thereby put upon the wharfinger, the goods being left

subject to the control and direction of the purchaser, it was held that the right of stoppage was lost. Sawyer v. Joslin, 20 Vt. 172.

That an actual acceptance by the vendee himself, as is indicated by the court in the principal case, is required to defeat the vendor's right to stop, is certainly not the law. The vendor's mortgagees received the goods at his place of business, of which they had possession as his mortgagees, and held them under a mortgage covering after-acquired property. He knew the goods were so received and held, and he did not notify either the seller or his mortgagees that he would not be bound by that acceptance. Under such circumstances the goods could hardly be said to be still in transit. In Miller v. Webster, 8 Atl. Rep. 470, the court held that there was no effectual exercise of the right of stoppage *in transitu* where "a purchaser of goods which had been shipped to him, and were in the carrier's warehouse subject to his order, finding that he was insolvent, ordered the carrier to return them to the seller. While they were being removed from the warehouse for that purpose, a sheriff took possession of them under insolvency proceedings, as the property of the purchaser. The seller, upon hearing of the insolvency, wrote a letter for the return of the goods. Park, C. J., in his opinion states the circumstances, and adds: "These are the facts, and the principal question is, do they show that the plaintiff stopped the goods *in transitus*, that is, took possession of them before they were taken possession of by the vendee, or by his representative, the deputy sheriff, or the trustee in insolvency? The vendee himself carefully avoided taking possession of the goods, and sought to return them to the plaintiff." Yet it was held that the goods had been received and that the vendor's right of stoppage was gone.

In the case of Estey v. Truxel, 25 Mo. App. 238, there is an intimation, at least, that actual possession by the consignee is necessary to defeat the consignor's right, and that constructive possession will not be sufficient. A later decision of the St. Louis Court of Appeals, however (Klein v. Fischer, 30 Mo. App. 568), seems to repudiate that doctrine. (See N. Y. Law Journal, April 6.) There it appeared that goods which were still in the carrier's freight-house had been sold by the consignee without his having taken actual possesion thereof, and it was held that the constructive possession thereby assumed was sufficient to defeat the right of stoppage.

As to what will be sufficient notice to a carrier to stop goods, it is held that express notice must be given at such time and under such circumstances that the carrier may by the exercise of reasonable diligence communicate to his servants in time to prevent the delivery of the goods to the consignee. But no particular form is necessary. Whitehead v. Anderson, 9 M. & W. 518; Litt v. Cowley, 7 Tant. 169; Bell v. Moss, 5 Wheat. 189; Bloomingdale v. Railroad Company, 6 Lea (Tenn.), 618. A notice to return the goods *in transitu* is sufficient, although it does not state any reasons therefor. Aller v. Maine Central R. Co., 9 Atl. Rep. 895.

NECROLOGY.

THE LATE MR. JUSTICE DEVENS.—Charles Devens, associate justice of the Supreme Court of Massachusetts, died suddenly from heart failure January 7th, 1891. He was born in Charleston, Massachusetts, April 4th, 1820. He entered Harvard College at the age of fourteen and graduated in the class of 1838. He graduated at the Harvard Law School in 1840, and was admitted to the bar in the following year. In April, 1867, he was appointed by Gov, Bullock one of the justices of the superior court of Massachusetts, and served until 1873, when he was promoted by Gov. Washburn to the bench of the supreme judicial court. On the 17th of June, 1875, occurred the centennial celebration of the battle of Bunker Hill, and Mr. Justice Devens delivered a masterly oration. Two years later he resigned his seat on the supreme bench to accept the position of attorney-general of the United States tendered by President Hayes. At the close of his term in 1881 he ruturned to Massachusetts and in the same year he was again appointed a justice of the Supreme Court of Massachusetts and held that position to the time of his death. Judge Devens' several terms of service upon the bench cover a period of about twenty years, and during that time by his courteous ways and his fairness he greatly endeared himself to the members of the bar. He was not a great student of the law but had a judicial mind.

At a meeting of the Bar at Boston the resolutions offered by Hon. William C. Endicott, and adopted, enumerated the rare and peculiar qualifications of Judge Devens for the judicial office; and referred to his success as attorney-general of the United States, in performing the duties of that great office, requiring executive as well as professional and judicial qualities. He revived the practice of arguing himself all important cases of the government in the Supreme Court, a duty practically abandoned by his immediate predecessors. His opinions as attorney-general covering questions of law and practice, interpretation and custom, are quite models in their way.

THE LATE CHIEF JUSTICE APPLETON.—John Appleton, formerly Chief Justice of the Supreme Court of Maine, died from heart failure February 7th, 1891. He was born in New Ipswich, N. H., eighty-six years ago and graduated at Bowdoin College in 1822 at the age of eighteen. He commenced the practice of law at Sebec, Piscataquis county, Me., in 1826, but in a few years removed to Bangor, in that State, which has since been his home. He was appointed reporter of the Supreme Court of Maine in 1844; Associate Justice of that court in 1852; and Chief Justice in 1862. He retired from the bench in September, 1883, when John A. Peters succeeded to his place as Chief Justice. At that time Judge Appleton was over seventy-nine years of age, but was still in full vigor of mind and body. Thus he was a justice of the Supreme Court of the State for thirty-one years, and during twenty-one years of this period he was Chief Justice.

THE LATE CHIEF JUSTICE MORTON. — Marcus Morton, late Chief Justice of the Supreme Court of Massachusetts, died February 10th, 1891, of heart failure. He was born at Taunton, Mass., April 8, 1819. His father, Marcus Morton, was a justice of the same court from the year 1925 to 1840, in which year he was elected governor of the State. The son graduated at Brown University in 1838, studied law at the Law School of Harvard University and was admitted to the bar in 1841. He immediately opened an office in Boston and soon acquired an extensive practice. In 1853, he was an efficient member of the constitutional convention of Massachusetts, his father also being a member; and both the son and the father were in the house of representatives of the State in 1858. In this

year the former was appointed a justice of the Superior Court for Suffolk county. Later he was made a judge of the State Superior Court. After ten years' service in this court he was appointed in 1869, an associate justice of the Supreme Court of the State; and in 1882, upon the resignation of Chief Justice Gray, he was made Chief Justice. This high office he resigned in 1890.

WILLIAM WELLS.—William Wells, one of the most distinguished lawyers of Michigan, died recently in the county court room, Detroit, without a moment's warning. He was Kent professor of law in the university of Ann Arbor, chairman of the general council of the American bar Association, and held the office of collector of customs for the port of Detroit in the presidency of Andrew Johnson. He was born in St. Albans, Vermont, 1833.

GEO. C. INGHAM.—The death of Geo. C. Ingham, one of the most prominent lawyers at the Chicago bar, was sudden and unexpected. Though comparatively a young man he had made a reputation which was indicative of future distinction. A correspondent writes of him: "In the recent death of George C. Ingham, the bar of Illinois lost one of its best lawyers and most forceful orators. The sound of his voice in great causes was like the trumpet call of victory. Clearness, force, and earnestness were the foundation elements of his greatness. An unassuming man, it was the clash of contest that brought out in all its power, the reserved strength of his nature. As a logician, he was profound and sagacious; as a cross-examiner, brilliant; as an advocate, irresistible; and, as a man, honorable, kind and steadfast. He won the enduring love of those who knew him best, and made his life a helpful, hopeful, example to mankind."

RECENT PUBLICATIONS.

TIEDEMAN ON SALES.

The author of this work is already a prolific writer and is fast becoming a recognized authority upon the subjects which he has so intelligently explored. It can not be said that this book, as indeed any of his books, is as phylosophic as it is practical. The author, in all of his works, contents himself with a review of what the law is, not what it ought to be, and therein perhaps lies their chief merit and the reason why they have been found to be of special value to law students, as is shown by their general use in many of the law schools. Mr. Tiedeman certainly has a clear and admirable style of expression, and gives evidence of industry and care in the preparation of material. It is impossible within the limits of this notice to give more than a bare statement of the contents of the book. Sufficient to say, it treats of sales of personal property, the parties thereto, the price, the thing sold, the statute of frauds in respect to sales, the transfer of title, delivery, acceptance, vendor's lien, stoppage in transitu, payment and tender, fraudulent sales, warranty, conditional sales, chattel mortgages, involuntary sales, sales by agents, auction sales, illegal sales, rights of bona fide purchasers, and remedies for breach of contract of sale. It could hardly be contended that within its five hundred and fifty pages of text it is possible to treat exhaustively of the entire subject of sales and of chattel mortgages, and the author probably does not make such a claim. It may be said, however, that as an elementary treatise upon the general principles pertaining to those subjects, it is reliable and accurate, and well prepared. There is a good index and the mechanical execution is first class.

QUERIES.

QUERY NO. 8.

Is the title to real estate good in the territory of Utah, where an individual sells land to a city and the city plats and resells? The law of the territory gives the cities a right to buy and sell real estate. Is this constitutional? B. A. M.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCORD AND SATISFACTION— Joint Tort-feasors.— Where plaintiff riding on the highway was injured by collision with defendants and the driver of the latter gave plaintiff a small amount and promised more apparently out of pity, *held*, that this constituted no accord and satisfaction so as to release defendant since the driver was not a joint tort feasor.—*Sieber v. Amunson*, Wis., 47 N. W. Rep. 1126.

2. ACTION AGAINST HEIRS AND DEVISEES.— In a declaration under the statute against heirs and devisees it is not necessary to aver that the personal estate of the

decedent is insufficient to pay his debts.—*Dodson v. Taylor*, N. J., 21 Atl. Rep. 293.

3. ADMINISTRATOR—Discretion of Court.—The discretion of a district judge exercised in the appointment of a succession administrator as a rule will not be lightly interfered with, particularly where it appears that there are minors concerned.—*Succession of Romero*, La., 8 South. Rep. 632.

4. ADMINISTRATION—Sale—Notice.— Where land was sold without order of court, *held*, that the probate records were notice to the purchaser of the tract sold, without such order.—*Appeal of Moores*, Mich., 48 N. W. Rep. 39.

5. ADMINISTRATION— Sale of Land.— Under Rev. St. Ind. 1881, § 2332, a decedent's land may be sold to pay the expenses of administration.—*Falley v. Gribling*, Ind., 26 N. E. Rep. 794.

6. ADMINISTRATION—Allowance of Claims.—Where a husband and wife declare a homestead on property they have mortgaged, the mortgage must be presented against the husband's estate for allowance after his death, notwithstanding the complaint in foreclosure expressly waives all recourse to any property of the estate except that described in the mortgage.—*Wise v. Williams*, Cal., 25 Pac. Rep. 1064.

7. ADMINISTRATION—Executors—Investment.—Having used a legacy left for them to invest, for their own benefit, the executors are liable to account for it, and cannot turn into the estate the proceeds of the property.—*Miller v. Miller*, Md., 21 Atl. Rep. 321.

8. ADMIRALTY — Collision — Negligence.— A steamer which passes other boats at high speed, so near as to damage them by her displacement waves, is liable for such damage.—*The Monmouth*, U. S. D. C. (N. Y.), 44 Fed. Rep. 809.

9. ADMIRALTY — Bond to Marshal. — A bond to the marshal, under the act of 1847, unlike a stipulation for the value of the vessel, does not necessarily afford security to other creditors than the libelant in the particular suit.—*Bailey v. Sundberg*, U. S. D. C. (N. Y.), 44 Fed. Rep. 807.

10. ADMIRALTY—Wharves.—Where a vessel lying on a private dock overlapped on to the adjoining wharf, the owner of such adjoining wharf could recover a *pro rata* proportion of the customary charge for wharfage on the vessel, but that, when no part of the cargo was loaded or unloaded over the adjoining wharf, the owner could not recover any part of the customary wharfage charged in respect of the cargo.—*Ranstead v. Fahey*, U. S. D. C. (Md.), 44 Fed. Rep. 805.

11. ADOPTION—Proceedings.—An order of adoption is invalid unless it appears from the record that the person adopting resided in the county under the jurisdiction of the superior court before which proceedings were had.—*Ex parte Clark*, Cal., 25 Pac. Rep. 967.

12. ADVERSE POSSESSION—Rights of Disseisor.—A disseisor in possession has an interest in the land which he may transfer with the possession to another, or which on his death will pass to his heir.—*City of St. Paul v. Chicago, etc. Ry. Co.*, Minn., 48 N. W. Rep. 17.

13. ADVERSE POSSESSION—Construction of Instrument. —Where a person is in possession of land, claiming it under a writing conferring upon him a right to the land, such possession is regarded as adverse *prima facie* against all persons except his vendor, where such writing is an executory agreement, contemplating a future conveyance.—*Ketchum v. Spurlock*, W. Va., 12 S. E. Rep. 832.

14. AGISTMENT—Lien.—Where a person takes a number of animals to pasture for an agreed compensation, he has a lien on each for the amount due on all; and one of them cannot be taken away, without payment for all, though those remaining are ample security.—*Yearsley v. Gray*, Penn., 21 Atl. Rep. 318.

15. APPEAL—Review—Record.—A ruling on a motion to set aside a judgment by default cannot be reviewed in the absence of a bill of exceptions containing the affidavits filed in support of the motion.—*Fidelity Ins. Co. v. Hammock*, Ark., 15 S. W. Rep. 360.

16. APPEAL—Review.—The only way to bring before the appellate court the evidence of witnesses used in the trial court in proceedings at law is by bill of exceptions, and that court cannot consider anything as evidence not contained therein.—*Waddell v. Cunningham*, Fla., 8 South. Rep. 643.

17. APPEAL—Citation.—The requirement that citation on appeal shall be served at least 25 days before the first day of a term of the supreme court is answered by service on the 19th day of December, when the first day of the term falls on the 13th day of the succeeding January.—*Crawford v. Feder*, Fla., 8 South. Rep. 642.

18. APPEAL—Jurisdiction—Freehold.—A suit to enjoin the levy of an execution on certain land, where the only issue is whether the judgment lien on said land had been released by virtue of a decree in partition, does not involve a freehold within the meaning of the Illinois statute regulating appeals.—*Adkins v. Beane*, Ill., 26 N. E. Rep. 657.

19. APPEAL—Requisites — Time. — Under Rev. St. Ill. 1889, ch. 110, § 91, an appeal cannot be taken more than 20 days after rendition of judgment by the appellate court, even though a motion for a rehearing is pending at the expiration of such 20 days.—*Sholty v. McIntyre*, Ill., 26 N. E. Rep. 655.

20. APPEAL—Bond.—Under Rev. St. Tex. 1879, art. 1639, a bond is insufficient, the condition of which is that the "appellant shall prosecute his appeal to effect, and shall pay all the costs which have accrued in the court below, or which may accrue in the court below, or which may accrue in the appellate court."—*Allison v. Gregory*, Tex., 15 S. W. Rep. 416.

21. APPEAL—Bond.—Under Sayles' Civil St. Tex. arts. 1639, 1639*a* a bond, on appeal from a justice of the peace, conditioned that "appellant shall prosecute his appeal with effect, and shall pay all costs" is a compliance with neither section, and the appeal must be dismissed.—*Pace v. Webb*, Tex., 15 S. W. Rep. 269.

22. APPEAL—Case Made—Stipulation.—The attorneys for the parties to a record cannot extend the time for making the case by stipulation between themselves, in the absence of an order of the court or judge granting such an extension.—*Limerick v. Haun*, Kan., 25 Pac. Rep 1069.

23. APPEAL— Divided Court.—On motion to affirm a judgment where the cause has been several times heard and no decision reached owing to a change in the *personnel* of the court and a division of opinion among the judges but before an opinion was written, three new judges qualified to hear the case were selected: *Held*, that the cause should be presented on its merits before the newly constituted court.—*Luco v. Toro*, Cal., 25 Pac. Rep. 963.

24. APPEAL—Objections not Raised Below.—The entry of judgment on stipulation of parties cannot be set aside because the court did not compel defendant to prevent stipulation by plea.—*Washington v. Louisville & N. R. Co.* Ill., 26 N. E. Rep. 653.

25. ARBITRATION — Submission and Award.—If, after another is substituted for one of the original arbitrators chosen under the agreement to submit, a party submits his case, he cannot, after the award, complain that the substitution was without his consent.—*Fowler v. Jackson*, Ga., 12 S. E. Rep. 811.

26. ASSAULT AND BATTERY—Jurisdiction.—Laws Ind. 1889, p. 363, which provides that, upon conviction in criminal courts and before certain magistrates of an assault and battery, a certain punishment shall be inflicted, does not deprive the circuit courts of jurisdiction of prosecution for such offenses.—*Hinkle v. State*, Ind., 26 N. E. Rep. 777.

27. ASSIGNEE IN INSOLVENCY.—A complaint in an action by an assignee in insolvency, which alleges that the deed of assignment was "duly" filed and recorded in the recorder's office of the county in which the assignor resided, and in which the real estate is situated,

is sufficient, under Rev. St. Ind. 1881, § 2663.—*Jewett v Perrette*, Ind., 26 N. E. Rep. 685.

28. ASSIGNMENT.—A contract by a coal mining company to furnish daily, for one year, a certain quantity of coal taken from a particular vein, to defendant railroad company, is not assignable.—*Worden v. Chicago & N. W. R. Co.*, Iowa, 48 N. W. Rep. 71.

29. ASSIGNMENT—Life Insurance — Duress.—One who has assigned a policy of insurance on his life to a creditor to secure a debt, and has acquiesced in the assignment for many years, taking no steps to avoid it, and knowing that it was necessary to pay the premiums to keep it alive, cannot, in suit thereon, avoid the assignment on the ground of duress.—*Walker v. Larkin*, Ind., 26 N. E. Rep. 684.

30. ASSIGNMENT FOR BENEFIT OF CREDITORS—Laborers' Liens.—Where property is conveyed to a trustee in trust to manage it, and out of the proceeds, to pay the debts of the grantors, and the trustee afterwards forecloses his lien for expenditures, leaving unpaid claims in favor of laborers employed by him on the property, who were not parties to the foreclosure suit, the purchaer at the foreclosure sale takes subject to such claims, though he had no notice of them.—*Shull v. Fontanet Min. Ass'n*, Ind., 26 N. E. Rep. 790.

31. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Where an insolvent debtor owing a bank of which he was a depositor made a general deposit to the credit of his own account and the next day the bank applied the deposit to the payment of a note due from him: *Held*, that if the bank had reasonable cause to believe that the debtor was insolvent the money can be recovered by the assignee.—*Tripp v. Northwestern Nat. Bank*, Minn., 48 N. W. Rep. 4.

32. ASSIGNMENT FOR BENEKIT OF CREDITORS—Preference.—In an action between a mortgagee and the mortgagors' assignee, where the issue is whether the mortgage was an unlawful preference in contemplation of insolvency, it is reversible error to instruct the jury that, if the mortgagors "were not in condition to meet their debts as they came due from time to time in the ordinary course of business, by the resort to such means and methods as are usually employed by business men in their business, then they were insolvent."—*Peabody v. Knapp*, Mass., 26 N. E. Rep. 696.

33. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences.—Under Sayles' Civil St. Tex. art. 65a, providing that every assignment by an insolvent debtor, or in contemplation of insolvency, shall inure to the equal benefit of all creditors, as assignment by a firm is not brought within the statute unless it is shown that each of the partners is insolvent.—*Hudson v. Eisenmayer Milling, etc. Co.*, Tex., 15 S. W. Rep. 385.

34. ASSIGNMENT FOR BENEFIT OF CREDITORS—Attaching Creditors.—Where an insolvent's property is held by the sheriff under attachment at the time the assignment is made, and the attaching creditor's consent that the sheriff shall deliver possession to the assignee, subject to their rights, the county court, by such change, has jurisdiction to determine the rights of attaching creditors.—*Plume-Atwood Manuf'g Co. v. Caldwell*, Ill., 26 N. E. Rep. 599.

35. ASSUMPSIT—Liability of Principal.—When a party purchases goods on credit in his own name for another, without disclosing the name of the principal, the seller may recover the purchase price from the principal when discovered.—*Lamb v. Thompson*, Neb., 48 N. W. Rep. 58.

36. ATTACHMENT—Appeal—Bond.—In an action on an appeal-bond, given on appeal from a judgment against claimant and the sureties on his claim-bond in an attachment suit, declarations of one who is made a defendant only on the ground of his being surety on the appeal-bond are not admissible to bind his co-defendants as to their liability on the judgment — *Thurman v. Blankenship-Blake Co.*, Tex., 15 S. W. Rep. 387.

37. ATTACHMENT—Affidavit. — Though the levy of a writ of attachment in which the clerk had omitted to fill out the blank for the amount of the demand may be ineffectual as to third persons, yet as between the parties, and in a case where the possession of the property, which was already in the hands of the sheriff under prior attachments, was not interfered with, it was not error to permit the writ to be amended after levy.—*Munzenheimer v. Manhattan Cloak, etc., Co.*, Tex., 15 S. W. Rep. 389.

38. ATTACHMENT— Intervention by Receiver.—Under Acts Miss. 1884, p. 76, ch. 64, §§ 2, 3, permitting a creditor of an attached debtor to intervene and defend the suit, a creditor cannot intervene after rendition of judgment against defendant in attachment.—*Paine v. Holliday*, Miss., 8 South. Rep. 676.

39. BANK—Assignment—Check.—A check is a valid instrument for the assignment of the credit of the drawer against the bank, but it does not bind the creditors of the drawer who are third persons unless the drawer was notified to the bank before a change in the title to the credit has taken place.—*Bernard v. Whitney Nat. Bank*, La., 8 South. Rep. 702.

40. BILL OF EXCEPTIONS—Evidence.—The brief of the evidence filed on motion for a new trial is part of the record, and may be specified as the "brief of the evidence" in the bill of exceptions, without greater particularity, under Code Ga. § 4253.—*Moore v. Huggins*, Ga., 12 S. E. Rep. 814.

41. BOND—Application of Check.—A check on defendant bank made payable to plaintiff's husband or bearer for goods sold by him as plaintiff's agent: *Held*, that the bank could not apply the check on indebtedness due bank by husband.—*Citizens Bank v. Harrison*, Ind., 26 N. E. Rep. 683.

42. BOUNDARIES—Acquiescence— Estoppel—Evidence.—Where adjoining land-owners have settled the boundary line between their respective tracts with full knowledge as to the true boundary, and have both occupied up to the line as established for more than 21 years, they are estopped from disputing the accuracy of the line as established.—*Scheetz v. Sweeney*, Ill., 26 N. E. Rep. 648.

43. CARRIERS—Connecting Carriers.—Where an initial carrier places a loaded car on the side track of a connecting carrier, without notice to the latter, and without any mark of the name and address of the consignee, or any way-bill or shipping directions, the connecting carrier is only a bailee of the car, and its stringent liability as common carrier does not attach until such way-bill or directions are given.—*Mt. Vernon Co. v. Alabama G. S. R. Co.*, Ala., 8 South. Rep. 687.

44. CARRIERS—Delivery of Freight.—A mere switch, at which there is neither agent, station, nor platform, but where shipments are made by loading upon cars placed on the switch by request, is not a depot, at which a deposit of goods along side is such a delivery to the company as will make it liable as a common carrier.—*Kansas City, etc. R. Co. v. Lilly*, Miss., 8 South. Rep. 644.

45. CARRIERS—Limiting Liability. — A carrier's contract of immunity from the consequences of the negligence of its employees must be expressed in unequivocal terms.—*Kenney v. New York Cent. R. Co.*, N. Y., 26 N. E. Rep. 626.

46. CARRIERS—Shipments—Contract. — The rule that parol negotiations are conclusively presumed to be merged in the written contract cannot apply to parol contracts made after the execution of the written contract, which might be changed or rescinded by parol at any time after its execution.—*Toledo, etc. R. Co. v. Levy*, Ind., 26 N. E. Rep. 773.

47. CARRIERS OF PASSENGERS—Alighting from Train.—How far the duty rests upon carriers of passengers by rail to assist persons entering or getting off their cars.—*Texas, etc. R. Co. v. Miller*, Tex., 15 S. W. Rep. 264.

48. CARRIERS OF PASSENGERS—Trespasser.—Removing a trespasser from a train of cars while the train is in motion, though moving very slowly is not negligence or wantonness *per se*.—*Southern Kan. R. Co. v. Sanford*, Kan., 25 Pac. Rep. 891.

49. CERTIORARI—Peremptory Writ.—A writ of *certiorari* will not be made peremptory after judgment where the accused has failed to reserve any bill of exception, and has neglected to file any plea in bar, or to make any motion in arrest of judgment, the offense being substantially charged in the language of the statute.—*State v. Mouton*, La., 8 South. Rep. 631.

50. CHATTEL MORTGAGE—Recording.—Filing the mortgage for record, though as a matter of fact the recorder neglected to record it, operated as constructive notice to the purchaser under Rev. St. Ind. § 4914.—*Chandler v. Scott*, Ind., 26 N. E. Rep. 797.

51. COMMUNITY PROPERTY — Presumption. — A headright certificate was issued in 1838 to a married man, and so became community property. The grantee, five years after the death of his wife, transferred it to plaintiffs in 1855, to whom a patent was issued in 1858: *Held*, in an action against the heirs of the wife alleging ouster in 1887, that, after the lapse of so much time, a presumption of fact would be indulged that the sale of the certificate by the survivor of the community was for the payment of community debts.—*Hensel v. Kegan*, Tex., 15 S. W. Rep. 275.

52. CONDEMNATION PROCEEDINGS—Opinion Evidence.—Upon an issue as to the damages by the construction of a railroad over defendant's farm, it is not error to permit witnesses shown to be competent, and acquainted with the premises to express their opinion as to the damages, including the value of the portion taken and the damage done to the rest of the tract.—*Nevada, etc. R. Co. v. DeLissa*, Mo., 15 S. W. Rep. 366.

53. CONSTITUTIONAL LAW.—An act of the legislature forbidding the cutting through of a railroad road-bed is void. The legislature cannot circumscribe the right of the land-owner in the legal use of its own property.—*Koch v. Delaware, etc. R. Co.*, N. J., 21 Atl. Rep. 204.

54. CONSTITUTIONAL LAW — Corporations. — Const. Tenn. art. 11, § 8, cl. 2, providing that "no corporation shall be created, or its powers increased or diminished by special laws," applies only to private corporations.—*Williams v. City of Nashville*, Tenn., 15 S. W. Rep. 364.

55. CONSTITUTIONAL LAW—Removal of Paupers.—The statute authorizing the chairmen of the board of county commissioners to order the removal to the county of their legal settlement of poor persons who have applied for public support in another county, and are likely to become chargeable thereon for support, and who after warning to depart therefrom are unable or have refused to do so, *held* constitutional.—*Lovell v. Seeback*, Minn., 48 N. W. Rep. 23.

56. CONSTITUTIONAL LAW—Title of Acts.—Under Const. Iowa, art. 3, § 29, declaring that every act shall embrace but one subject which shall be expressed in the title: *Held*, that the matter embraced in the statute considered herein, constitutes but one subject and is sufficiently expressed by the title.—*Christie v. Life Indemnity Co.*, Iowa, 48 N. W. Rep. 94.

57. CONTEMPT—Petition.— Proceedings for contempt, not committed in the presence of the court, are instituted by filing an information under oath, stating the facts constituting the alleged contempt. The charge should be stated in a positive manner.—*Ludden v. State*, Neb., 48 N. W. Rep. 61.

58. CONTRACT—Validity—Appeal.—An agreement between a member of a firm engaged in procuring and selling options for coal lands and a railroad company, to pay such member a commission on the sale, when not fraudulent as to the company, will not, on appeal, be declared void, as against public policy, because of a condition to keep secret the payment of the commission.—*Gleason v. Chicago, etc. Ry. Co.*, Iowa, 48 N. W. Rep. 88.

59. CONTRACT—Construction.— When a covenant by defendant, not to practice medicine in a certain town so long as plaintiff remains in practice there, contains a provision that defendant shall have the right to practice there on paying plaintiff a specified sum, this sum is the price agreed on for the privilege of practicing, and is not liquidated damages for a breach of the contract.—*Smith v. Bergengren*, Mass., 26 N. E. Rep. 690.

60. CONTRACT—Correspondence.—The matter alleged in the declaration was sufficient in law to entitle the plaintiff to maintain his action; the letters and cablegrams showing a complete contract.—*Gartner v. Hand*, Ga., 12 S. E. Rep. 878.

61. CONTRACTS—Evidence.—Where an oil-well drilled under contract is so far perfected in accordance with the contract as to answer the intended purpose, and is taken possession of and turned to that purpose, no mere imperfection, which is not wilful, will prevent a recovery therefor.—*Holmes v. Chartiers Oil Co.*, Pa., 21 Atl. Rep. 231.

62. CONTRACTS — Performance — Defective Work.—Where the owners of a wharf contract for its extension, and furnish the plans and specifications to the contractor, who builds it in accordance therewith, he is not liable for its giving away because of defects in the plans.—*Beswick v. Platt*, Penn., 21 Atl. Rep. 306.

63. CONTRACT—Public Policy.—A contract by a railroad company in settlement of a claim for personal injuries by an employee to give him permanent employment on a switch-engine is not void as against public policy in that it would require the company to employ the injured person even though he was not competent.—*Jessup v. Chicago etc. R. Co.*, Iowa, 48 N. W. Rep. 77.

64 CONTRACT—Real Estate Agent.—Facts, *held*, sufficient evidence to support a finding that the contract of sale of real estate should be binding from the time the terms were agreed on.—*Green v. Cole*, Mo., 15 S. W. Rep. 317.

65. CONTRACT—Reformation.—Either party to a written contract for the sale or exchange of lands may have the same specifically enforced in a court of equity, with such corrections in it as parol proof may show to be necessary to correct a mistake made in reducing the contract to writing.—*Fishack v. Ball*, W. Va., 12 S. E. Rep. 856.

66. CONTRACT—Remote Damages.—The defendants as as a counter-claim, sought to recover damages for defective workmanship and material used in the manufacture of barrelheading by the plaintiffs for the defendants. Proof that, by reason of a sale of the defective heading by the defendants, they were afterwards unable to sell other property of that kind, *held* inadmissible, both because not specially pleaded, and because such damages are too remote.—*Loudy v. Clarke*, Minn., 48 N. W. Rep. 25.

67. CONTRACT—Rescission.—In an action by the vendor to rescind a sale of land the value of the land need not be alleged in the complaint.—*Ross v. Hobson*, Ind., 26 N. E. Rep. 775.

68. COPORATIONS—Dissolution.—Under the provisions of section 20, p. 232, McCiel. Dig., stockholders in corporations are liable, upon a dissolution of the company, for the debts thereof to an amount equal to the amount in par value of the stock held them at the time of such dissolution.—*Gibbs v. Davis*, Fla., 8 South. Rep. 633.

69. CORPORATIONS—Foreign Corporations—Laws Mass. 1889, ch. 452, § 2, providing that "no corporation established under the laws of another State or country shall carry on a banking, mortgage loan and investment, or trust business" in Massachusetts under a name previously in use by a domestic corporation, or so nearly identical as to mislead, is intended to prohibit a banking business, a mortgage business, a loan and investment business, or a trust business, by a foreign corporation under such a name.—*International Trust Co. v. International Loan & Trust Co.*, Mass., 26 N. E. Rep. 693.

70. CORPORATIONS—Mortgage.—A mortgage by a solvent corporation to one of its officers and stockholders to secure a loan made by him, is not invalid on account of the relation between the parties.—*Mullanphy Bank v. Schott*, Ill., 26 N. E. Rep. 640.

71. CORPORATION—Power of Officers.—Where the board

authorized the officers to make arrangment to procure funds and to execute mortgage on the property of the corporation as additional security for its old indebtedness, *held*, that the officers were authorized two months thereafter to give new note and mortgage for old indebtedness though new property had been acquired in in the meantime.—*Shaver v. Hardin*, Iowa, 48 N. W. Rep. 68.

72. CORPORATIONS — Stockholders. — A stockholder cannot be sued individually for the price of goods sold to a *de facto* corporation as such, on the ground that it was not legally incorporated.—*Cory v. Lee*, Ala., 8 South. Rep. 694.

73. CORPORATIONS—Surrrender of Unpaid Stock.—A resolution adopted by a corporation authorizing the subscribers to the capital stock to reduce their sub scriptions by the surrender of unpaid shares is valid as between the company and the subscribers.—*Glenn v. Hatchett*, Ala., 8 South. Rep. 656.

74. COUNTY TREASURER'S BOND—Defenses.—In an action on a county treasurer's bond for his failure to pay over money to his successor, a plea alleging that the default was covered by a bond given during a former term of such treasurer is demurrable.—*McKinney v. State*, Miss., 8 South. Rep. 648.

75. COURTS—Clerk—De Facto Officer.—A clerk of the court whose resignation has been accepted is a *de facto* officer until his successor has been qualified.— *Cook v. State*, Ala., 8 South. Rep. 686.

76. COURTS—Jurisdictional Amount.—Where the creditor of an estate sues in the district court on a claim of less than $500, to set aside a gift by the decedent and subject it to his demand, making the donee and the executor parties defendant, and the court finds in favor of the donee, it is error, under Laws Tex , to refuse relief by a general judgment against the executor, and dismiss the cause without prejudice to a new suit.—*Carter v. Hubbard*, Tex., 15 S. W. Rep. 392.

77. CREDITORS' BILL—Appointment of Receiver.—Under Code Ala. § 3547, a receiver cannot be appointed where the answer, which is uncontroverted, shows that the property disclosed is covered by liens for more than its value, since it is not, in such case, subject to defendant's debts.—*McCullough v. Jones*, Ala., 8 South. Rep. 696.

78. CREDITORS' BILL—Burden of Proof.—On bill to subject certain land to the payment of a debt due complainant on the ground that the debtor furuished the money to purchase the land at a sale thereof by the debtor's assignees in bankruptcy, the land being conveyed to a third person, the burden of proof is on complainant.—*First Nat. Bank of Tuscaloosa v. Kennedy*, Ala., 8 South. Rep. 652.

79. CRIMINAL LAW—Appeal.—On appeal from a judgment, of conviction of assault and battery before a justice of the peace the circuit court cannot affirm the judgment on defendant's failure to appear.—*Thomas v. State*, Miss., 8 South. Rep. 647.

80. CRIMINAL LAW — Assault — Intoxication.—An instruction that if the jury have a reasonable doubt whether defendant's conduct at the time of the difficulty was inspired by his intoxicated condition, and not by malice, they must acquit, is properly refused, since drunkenness does not excuse crime.—*Fontille v. State*, Ala., 8 South. Rep. 688.

81. CRIMINAL LAW—Assault with Intent to Murder.—To constitute the crime of assault with intent to murder, there must be an intent to take life, and it is erroneous to charge that "an actual intention to take the life of the party assaulted is not a necessary ingredeint" of the crime.—*Walls v. State*, Ala., 8 South Rep. 680.

82. CRIMINAL LAW—Bribery—Accomplice.—Where defendant is charged as the accomplice of one offering a bribe, the jury should be instructed that defendant cannot be convicted unless they believe beyond a reasonable doubt that the principal offered a bribe.—*Leeper v. State*, Tex , 15 S. W. Rep. 411.

83. CRIMINAL LAW—Conspiracy—What Constitutes.—A conspiracy is an unlawful confederacy or combination of two or more persons to do an unlawful act, or have accomplished an unlawful purpose. The offense is complete when the unlawful conspiracy combination, or agreement is made, and a criminal act done in pursuance of the conspiracy is not necessary to justify a conviction for the crime of conspiracy itself.—*United States v. Lancaster*, U. S. C. C. (Ga.), 44 Fed. Rep. 896.

84. CRIMINAL LAW — Ex-post Facto.— Act Ind. 1889 amendatory of Rev. St. Ind. 1881, § 1788 as to the trial of accessories makes no charge except as to the remedy and hence it is not *ex-post facto* legislation as to crimes committed before its passage.—*Sage v. State*, Ind., 26 N. E. Rep. 667.

85. CRIMINAL LAW—Former Jeopardy.—A conviction in the circuit court of the United States for a crime of which that court has no jurisdiction is not a bar to a prosecution in a State court.—*Blyew v. Commonwealth*, Ky., 15 S. W. Rep. 356.

86. CRIMINAL LAW — Homicide — Self-defense.—*Held*, error upon the facts to refuse a charge on the law of self-defense.—*State v. Harrod*, Mo., 15 S. W. Rep. 383.

87. CRIMINAL LAW — Homicide — Self-defense.—Upon the facts of the case, *held*, that the jury should have been instructed as to self defense.—*Palmer v. State*, Tex., 15 S. W. Rep. 286.

88. CRIMINAL LAW—Instructions.—Where the entire charge is not misleading it will not be condemned because some of its paragraphs are inartistically expressed.—*Bayne v. State*, Tex., 15 S. W. Rep. 404.

89. CRIMINAL LAW — Larceny. — Where defendant's children found the pocket book containing the money alleged to have been stolen and delivered it to defendant, it was *held*, that to authorize a conviction a criminal intent in defendant to appropriate the money in his own use at the time of its delivery to him by his children must be shown.—*Allen v. State*, Ala., 8 South. Rep. 665.

90. CRIMINAL LAW—Murder—Manslaughter.—Where, on trial for murder, the evidence is wholly circumstantial, the jury should be charged as to murder in the second degree and manslaughter, since, though the evidence would sustain a conviction of murder in the first degee, yet it is also compatible with these lesser crimes. —*Jones v. State*, Tex., 15 S. W. Rep. 403.

91. CRIMINAL LAW—Murder—Self-defense.—It is proper to refuse to instruct that, if the jury are satisfied that defendant acted in self-defense, then the burden of proof is upon the State to show that beyond a reasonable doubt both that defendant brought on the difficulty and that retreat would have been safe. The burden is upon defendant to prove that there was no reasonably safe avenue of escape.—*Stit v. State*, Ala., 8 South. Rep. 669.

92. CRIMINAL LAW—Perjury.—Before the jury are authorized to convict the defendant on a charge of perjury, they must be satisfied from the testimony of one witness that the prisoner swore and testified falsely not believing his testimony to be true.—*United States v. Hall*, U. S. D. C. (Ga.), 44 Fed. Rep. 864.

93. CRIMINAL LAW—Playing Cards in Public Place.—Code Ala. § 4052, is violated by persons playing near enough to a public road to be seen engaged in a game of cards, though they are not near enough to be recognized.—*Franklin v. State*, Ala., 8 South. Rep. 678.

94. CRIMINAL LAW—Waiver of Jury Trial.—A defendant, who has pleaded not guilty, cannot, even by consent, be tried for felony by the court without a jury.—*Morgan v. People*, Ill., 26 N. E. Rep. 651.

95. CRIMINAL PRACTICE—Homicide — Right to Bail.—Upon the facts herein held that relator was entitled to bail.—*Ex parte Bates*, Tex., 15 S. W. Rep. 406.

96. CRIMINAL PRACTICE—Imprisonment — Verdict.—A judgment of conviction of manslaughter in the first degree, upon a verdict fixing the term of the imprison-

ment at one year in the penitentiary, such imprisonment being unauthorized under the above statutes, must be reversed entirely, and not merely as to the imprisonment.—*Zaner v. State*, Ala., 8 South. Rep. 698.

97. CRIMINAL PRACTICE—Quashing Information.—Under Pen. Code Cal. § 995, subd. 1, when information is quashed thereunder, the prisoner cannot be held for the filing of a new information without another examination before a committing magistrate. — *Ex parte Baker*, Cal., 25 Pac. Rep. 966.

98. CRIMINAL TRIAL—Competency of Jury.—Where a juror stated that he had no fixed opinion against capital punishment, or that a conviction should not be had on circumstantial evidence, but that he would not hang a man on such evidence: *Held*, under Code Ala. § 4333, that he was properly rejected.—*Griffin v. State*, Ala., 8 South. Rep. 670.

99. DAMAGES — Punitive. — In Washington, punitive damages cannot be recovered for personal injuries, however occasioned. — *Spokane Truck & Dray Co. v. Hoefer*, Wash., 25 Pac. Rep. 1072.

100. DEATH BY WRONGFUL ACT.—In an action by a mother for the death of her sons caused by defendant's negligence, under the Colorado statute allowing such an action to the heirs of a deceased person, it is sufficient to allege that plaintiff is the sole heir of the decedents, without further averring that they were unmarried and childless.—*Brennan v. Molly Gibson Consolidated Mining, etc. Co.*, U. S. C. C. (Colo.), 44 Fed. Rep. 795.

101. DEATH BY WRONGFUL ACT—Pleading.—How. St. Mich. § 8314, giving to personal representatives a right of action for negligently causing the death of their decedent, and Pub. Act Mich. 1885, No. 113, giving them a right of action for negligent injuries to the person of their decedent, provide distinct grounds of recovery, which cannot be joined in one action.—*Hurst v. Detroit City Ry.*, Mich., 48 N. W. Rep. 44.

102. DEDICATION—Private Sidewalks.— The owner of land situated in a township on a public highway, who for his own convenience constructs a board sidewalk in front of his premises, does not thereby dedicate it to the public, and may remove it.—*Commonwealth v. Barker*, Pa., 21 Atl. Rep. 243.

103. DEDICATION—Street.—Plaintiff owned land lying between two platted additions in each of which was a street, which intersected plaintiff's lot. For more than twenty years the public had passed over plaintiff's land in the street: *Held*, there was a dedication of a strip across plaintiff's land the width of the street.—*Town of Marion v. Skillman*, Ind., 26 N. E. Rep. 676.

104. DEED—Cancellation.—Upon the facts, *held* error for the lower court to set aside the conveyance herein, upon the ground of overpersuasion.—*Lader v. Lader*, Mich., 47 N. W. Rep. 1101.

105. DEED—Description.—Interpretation of deed as to the description, applying the rule that the call for quantity may be resorted to, to make that certain, which would otherwise be uncertain.—*Davis v. Hess*, Mo., 15 S. W. Rep. 324.

106. DEED—Mortgage — Parol Evidence. — Parol evidence that a deed was intended as a mortgage is not excluded by a recital that it was given in consideration of money advanced by the grantees for the purpose of buying the land.—*McLean v. Ellis*, Tex., 15 S. W. Rep. 394.

107. DEED OF CORPORATIONS—Acknowledgment.—Under an act respecting conveyances, the deed of a corporation aggregate, may be lawfully acknowledged by the representative of the corporation having authority to execute the deed on its behalf.—*Hopper v. Lovejoy*, N. J., 21 Atl. Rep. 298.

108. DEPOSITIONS.—Where depositions are taken upon commission, five days' notice thereof served upon the opposite party in the county where the action is pending is sufficient, under Code Iowa, § 3730, though the depositions are to be taken in another State —*Cook v. Shorthill*, Iowa, 48 N. W. Rep. 84.

109. DESCENT OF LAND—Rights of Surviving Husband. —A surviving husband, who, without having his dower assigned, continues to occupy his wife's land after her death, is liable to account to her heirs for the rents and profits thereof.—*Bedford v. Bedford*, Ill., 26 N. E. Rep. 662.

110. DIVORCE—Alimony.—For the purpose of determining the amount of alimony to be awarded it is proper to show the amount of pension money which the husband receives.—*Hedrick v. Hedrick*, Ind., 26 N. E. Rep. 768.

111. DIVORCE—Corroboration.—Evidence held sufficient corroboration under Civ. Code Cal. § 130, forbidding a divorce on the uncorroborated evidence or admissions of the party.—*Cooper v. Cooper*, Cal., 25 Pac. Rep. 1062.

112. DIVORCE—Evidence.—In divorce, the declarations of libelant, which are not part of the *res gestæ* made in the absence of respondent, are not admissible on libelant's behalf.—*Cain v. Cain*, Pa., 21 Atl. Rep. 309.

113. DRAINAGE—Repair of Levee.—Under Rev. St. Ill., 1889, ch. 42, § 37, it is not essential that the petition asking for an assessment to repair the levee should specify where the desired work is to be done in order to authorize the expenditure of the assessment in repairing the levee at a point outside the district.—*Hosmer v. Hunt Drainage Dist.*, Ill., 26 N. E. Rep. 584.

114. EJECTMENT— Defenses. — Where defendant in ejectment is not a mere trespasser, but claims title by deed from one in possession at the time of making the deed, he may set up a paramount title outstanding in a third person.—*Stephenson v. Reeves*, Ala., 8 South. Rep. 695.

115. EJECTMENT—Equitable Defense.—In a joint action by tenants in common for the recovery of land, where an equitable defense had been filed, it was error to charge the jury, that if, for any reason, any of the plaintiffs could not recover, none of them could recover.—*Milner v. Vandivere*, Ga., 12 S. E. Rep. 879.

116. EJECTMENT—Improvements.—Where a son enters into possession of land belonging to his father, with his father's consent, and in anticipation of a devise from him, and is afterwards ousted by the father, he is entitled to compensation for labor and money expended in permanent improvements.—*Duckett v. Duckett*, Md., 21 Atl. Rep. 322.

117. EJECTMENT—Insolvency of Defendant. — Where the defendant in ejectment had been in possession more than seven years under color of title and claim of right when the action was brought, her insolvency is not cause for her expulsion, and the appointment of a receiver to secure the mesne profits pending the suit.—*Davis v. Taylor*, Ga., 12 S. E. Rep. 881.

118. EJECTMENT—Writ of Possession.—Under Rev. St. Ill. ch. 77, § 1, and ch. 45, § 10, the common law rule that a writ of possession cannot issue more than a year and a day after rendition of judgment in ejectment has been abrogated.—*Bowar v. Chicago, etc. R. Co.*, Ill., 26 N. E. Rep. 702.

119. EMINENT DOMAIN—Compensation .— In condemnation proceedings, when damages done to a farm by the location of a railroad, arise entirely from its changed agricultural condition, a farmer is an expert with respect to the value of the land before the laying of the road as compared with their value after that transaction.—*Pa., etc. R. Co. v. Root*, N. J., 21 Atl. Rep. 285.

120. EMINENT DOMAIN — Compensation — Value.— On condemnation of land for public use, the present market value, and not the value to the owner or to the person seeking to condemn it, is the basis of compensation.—*San Diego Land & Town Co. v. Neale*, Cal., 25 Pac. Rep. 977.

121. EMINENT DOMAIN— Damages. — In proving the damage to that part of a farm not taken, it is proper to show what the improvements on the land were worth to it.—*Chicago, etc. Ry. Co. v. Eaton*, Ill., 26 N. E. Rep. 575

122. EQUITY—Legacy.—Since a court of law cannot in-

vestigate the sufficiency of a testator's estate to pay his debts, the devisee of a debt due the testator may sue the executor and debtor in equity to have his right thereto established, and recover a decree of payment against the debtor.—*Hayes v. Berdan*, N. J., 21 Atl. Rep. 340.

123. EQUITY—Parol Contract.—Where a mortgagee (plaintiff) of land owned by two persons, orally agrees with one of them (defendant) to relinquish the mortgage and that they will both become joint owners of the land, and performs his part of the agreement by such relinquishment, but defendant acquires title to the whole land and conveys it, equity will restore the *status quo ante* by reviving the mortgage as against defendant and a purchaser from him with notice.—*Mitchell v. Graham*, Miss., 8 South. Rep. 646.

124. ESCAPE—Liability of Jailer.—Where an insolvent debtor, whose discharge has been refused by the court, surrenders himself to the keeper of the county prison, who refuses to receive him because he is in charge of no officer, and has no writ or other record showing that he is an insolvent debtor, the surrender is not sufficient to make the keeper liable for the debt in case of the debtor's escape.—*Saunders v. Perkins*, Penn., 21 Atl. Rep. 257.

125. ESTOPPEL—Employment of Attorney.—One who knows that an attorney in prosecuting a suit in his behalf, and who, when judgment is obtained, collects money under it and enters satisfaction, is estopped to deny the attorney's employment, and is liable for a reasonable fee.—*Lindner v. Hinc*, Mich., 48 N. W. Rep. 43.

126. ESTOPPEL — Representations as to Title. — The former owner of land which has been sold for taxes, who, though in good faith, represents to a third person that the tax-title is good, and persuades him to purchase it, cannot, as against such purchaser, set up his legal title on learning that the tax-sale was void.—*Nelson v. Kelly*, Ala., 8 South. Rep. 690.

127. EVIDENCE—Declarations—Res Gestæ. — Declarations to be inadmissible as part of the *res gestæ* must be contemporaneous with the proper facts which they serve to qualify or explain.—*Tennis v. Interstate, etc. R. Co.*, Kan., 25 Pac. Rep. 876.

128. EVIDENCE — Record — Deed. — Testimony of a grantee that she never had any of the deeds in her chain of title in her possession or control, save that from her immediate grantor, which was lost, is sufficient to admit the records of such deeds in evidence.—*Rea v. Jaffray & Co.*, Iowa, 48 N. W. Rep. 78.

129. EXECUTION—Fraudulent Judgment—Creditors.—Where a judgment is collusively confessed for the purpose of defrauding creditors, such creditors may have relief therefrom in equity, though their judgments were not obtained until after the property seized under the fraudulent judgment had been sold by the sheriff.—*Kohl v. Sullivan*, Penn., 21 Atl. Rep. 247.

130. EXECUTION—Lien of Mortgage.—Where a judgment creditor issues execution and seizes land, and fails to seize the immovable by destination, this does not estop him from seizing in a second suit the property seized in the first.—*Townsend v. Payne*, La., 8 South. Rep. 526.

131. EXECUTORS AND ADMINISTRATORS—Instructions.—Trustees under a will cannot maintain a bill for instructions as to whether or not Pub. St. Mass. ch. 141, § 12, which provides that every trustee under a will shall, except as otherwise provided by law, give bond such as the probate court shall order, applies to them.—*Bullard v. Waterman*, Mass., 26 N. E. Rep. 691.

132. EXECUTOR'S SALE—Fraud.—A bill by the widow and legatees to set aside, on the ground of fraud and inadequacy of price, a sale of their testator's land by the executor, is demurrable if it fails to allege that the purchaser was a party to the fraud.—*Cascaden v. Cascaden*, Penn., 21 Atl. Rep. 259.

133. EXPERT TESTIMONY—Weight.—In an action for negligence, where expert witnesses have testified in plaintiff's behalf, it is error to instruct that in weighing their testimony the jury shall consider the interest, if any, they may have in the suit.—*Duvall v. Kenton*, Ind., 26 N. E. Rep. 688.

134. FALSE IMPRISONMENT—Mayor.—The mayor of a city is not liable to a civil action for false imprisonment for "corruptly and maliciously" retaining jurisdiction and imposing a fine, and imprisonment in default of payment, after defendant has moved for a change of venue, which, under Elliott, Supp. Ind. § 297, must be granted on proper affidavit by either party.—*State v. Wolever*, Ind., 26 N. E. Rep. 762.

135. FEDERAL COURTS — Conspiracy — Contempt. — Though the power to punish for contempt resided in courts of record long before the adoption of the federal constitution, the right of a citizen of a State to apply to a federal court to punish by contempt a violation of its decree against citizens of a sister State is nevertheless secured to him by the constitution and laws of the United States, which provide that the jurisdiction of the federal courts shall extend to all controversies between citizens of different States.—*United States v. Lancaster*, U. S. C. C., (Ga.), 44 Fed. Rep. 885.

136. FEDERAL COURTS—Records.—Act Cong. Aug. 12, 1848, and Act Feb. 26, 1853, and Act Aug. 1, 1888, secure to the citizens the right to examine these records free of charge, and the clerk is entitled to the fee only when he is required to make the search himself.—*In re Chambers*, U. S. C. C. (Neb.), 44 Fed. Rep. 786.

137. FEDERAL OFFENSE—Robbery from Mails.-A postal-car employee who takes from the mail under his charge a package containing things of value, although placed in the mail as decoy, and addressed to a person having no existence, is punishable under Rev. St. U. S. §§ 3891, 5467.—*United States v. Bethea*, U. S. D. C. (S. Car.), 44 Fed. Rep. 802.

138. FRAUDULENT CONVEYANCES.—In an action to set aside a conveyance of land as having been made in fraud of the grantor's creditor, an allegation in the complaint that the conveyance left the grantor without any property subject to execution is not sufficient, without further alleging that when the suit was brought the grantor had no property out of which the debt could then be collected.—*Brumbaugh v. Richcreek*, Ind., 26 N. E. Rep. 664.

139. FRAUDULENT CONVEYANCE—Bruden of Proof.—Where an insolvent father conveys to his son, and the son conveys to his mother and a prior creditor files a bill impeaching said conveyances as voluntary and fraudulent: *Held*, that the burden of proof is on the son and wife to prove payment of the purchase money.—*Spence v. Smith*, W. Va., 12 S. E. Rep. 828.

140. FRAUDULENT CONVEYANCE—Chattel Mortgage.—Chattel mortgage herein where mortgagor allowed to remain in possession until default, and permitted to dispose of stock in usual course of business: *Held*, not fraudulent.—*Sedgwick Bank v. Wichita Mer. Co.*, Kan., 25 Pac. Rep. 888.

141. FRAUDULENT CONVEYANCES—Creditors.—A contract which is unreasonable, and gives extravagant compensation for services, made by one who afterwards assigns property to pay the debt arising under it, though not carried out until after the assignor's insolvency, is not a fraud in law against those who were not creditors of the assignor at the time it was made.—*Hand v. Hitner*, Pa., 21 Atl. Rep. 260.

142. FRAUDULENT CONVEYANCES — Knowledge of Grantee.—Under an averment that a deed was without consideration, and to and for the use of the grantor, and made by him and accepted by the grantee with intent to defraud a creditor, the latter is entitled to relief on proof of an intent to defraud, known to the grantee, though he bought for his own use, and paid full value for the property.—*Garesche a. McDonald*, Mo., 15 S. W. Rep. 379.

143. GARNISHMENT—Chattel Mortgagee.—Acts 21st Gen. Assem. Iowa, ch. 117, giving creditors of a chattel mortgagor a right to attach the mortgaged chattels in the possession of the mortgagee upon paying to him the

amount of the mortgage debt, does not take away the remedy given by prior legislation by means of garnishing the mortgagee for any surplus realized over the amount secured.—*Buck-Renier Co. v. Merrill*, Iowa, 48 N. W. Rep. 96.

144. GARNISHMENT.—Expenditure by the garnishee on account of delay in the performance of the contract with defendants should be deducted from the contract price, and the fact that the garnishee did not claim damages for the delay or for costs paid, did not tend to show any liability to the judgment debtor.—*Mobile St. R. Co. v. Turner*, Ala., 8 South. Rep. 68.

145. GIFTS—Causa Mortis.—Facts held insufficient to constitute an effective gift *causa mortis* of bank deposits.—*Devlin v. Greenwich Sav. Bank*, N. Y., 26 N. E. Rep. 744.

146. GIFTS—Causa Mortis.—A gift *causa mortis* made in apprehension of death from one disease is not rendered invalid because of death from another disease.—*Ridden v. Thrall*, N. Y., 26 N. E. Rep. 627.

147. GRAND JURY—Prosecuting Attorney as Witness.—Where an attorney for the prosecution of an abduction case procures himself to be summoned as a witness before the grand jury, and urges the finding of the indictment, it should be quashed.—*Welch v. State*, Miss., 8 South. Rep. 673.

148. HIGHWAYS—Negligence.—Where a contractor, who is repairing a public highway, lawfully using a steam roller, securely covers the machine with a canvas cover, when not at work, as far as practicable to one side of the road, leaving room for passage, he is not liable on the ground of negligence for injuries to travelers, caused by its frightening their horses.—*Kelley v. Shanley*, Pa., 21 Atl. Rep. 305.

149. HOMESTEAD—Abandonment.—In action by the widow and child against one claiming through mesne conveyances under the husband's deed, *held*, upon the facts that there had been a complete abandonment of the homestead.—*Portwood v. Newberry*, Tex., 15 S. W. Rep. 270.

150. HUSBAND AND WIFE—Antenuptial Contract.—By an antenuptial agreement, relator released all claim which she "as widow" might have in her husband's estate, "whether in right of dower, or as her distributive share in the personalty, or otherwise, under the laws of the State:" *Held*, that relator, on her husband's death, was entitled to a proper allowance out of his estate, under How. St. Mich. § 5755.—*Pulling v. Wayne Probate Judge*, Mich., 48 N. W. Rep. 48.

151. HUSBAND AND WIFE—Contracts—Specific Performance.—An agreement by a married woman, owning a separate estate, made with her husband, to reimburse him from such estate, for moneys loaned to her, or paid by him for the benefit of her estate, on the faith of such agreement and at her request, will be enforced in equity against her separate estate.—*Healey v. Healey*, N. J., 21 Atl. Rep. 299.

152. HUSBAND AND WIFE—Title.—Where land levied on under execution against defendant was claimed by his wife, and it was shown that he asserted ownership, owed his wife money and just before suit against him executed a mortgage on the land without her knowledge, and that after the levy the mortgage was foreclosed by claimant's attorney without her knowledge: *Held*, that the title to the land was in defendant.—*Silvey v. Chamblee*, Ga., 12 S. E. Rep. 809.

153. INJUNCTION—Damages.—A reasonable amount paid as compensation to counsel as an item of the expense necessarily incurred in procuring the dissolution of an injunction wrongfully obtained may be recovered in a suit for damages upon an injunction bond.—*State v. Medford*, W. Va., 12 S. E. Rep. 864.

154. INJUNCTION—Exercise of Appointing Power.—The remedy by injunction may be employed by the incumbent of a public office to protect his possession against the interference of an adverse claimaint whose title is in dispute, until the latter shall establish his title at law; but it is not the appropriate remedy to try the title to a public office, or determine questions concerning the authority to make appointments thereto.—*Reemilin v. Mosby*, Ohio, 26 N. E. Rep. 717.

155. INJUNCTION—Literary Property.—Injunction will not lie to restrain the publication and sale of a cyclopædia of the same name as one published by complainants, and of the same contents, except as to certain copyrighted articles, when defendants have not infringed any copyright, and use no means to persuade the public that their publication is that of complainants.—*Black v. Ehrich*, U. S. C. C. (N. Y.), 44 Fed. Rep. 793.

156. INSURANCE—Forfeiture.—One employed to do mere clerical work by the agent of an insurance company, such as to fill out and issue policies, has no authority, by reason of such employment, to consent to additional insurance; and he cannot waive a clause in the policy providing for its forfeiture in case the insured procures additional insurance without the written consent of the company.—*Waldman v. North British Mercantile Ins. Co.*, Ala., 8 South. Rep. 666.

157. INTOXICATING LIQUORS.—Giving Away.—Under a statute prohibiting the "sale" of intoxicating liquors without a license, proof that defendant "gave" away the liquor is not sufficient to sustain a conviction.—*Williams v. State*, Ala., 8 South. Rep. 668.

158. INTOXICATING LIQUORS—Illegal Sales.—The sale having been made by the accused in person, the ownership of the liquor is immaterial, unless he justifies under a license to the owners.—*Evans v. State*, Ark., 15 S. W. Rep. 360.

159. INTOXICATING LIQUORS—License.—Comp. Laws Utah, 1888, § 1755, subd. 40, vests the council a legal discretion, and not an arbitrary power; and it cannot refuse a license to an applicant who has complied with the law governing applications for a license to sell intoxicating liquors.—*Perry v. City Council of Salt Lake City*, Utah, 25 Pac. Rep. 998.

160. INTOXICATING LIQUORS—Unlawful Sale.—Evidence that defendant sold to the State's witness three pint bottles of beer for 50 cents, though the price of each bottle singly was 20 cents, wrapped them in a bundle and delivered them to witness who drank the beer at his own room is not sufficient to sustain a conviction under Code Ala., sec. 4036 which prohibits the sale without license in less quantities than one quart.—*Olmstead v. State*, Ala., 8 South. Rep. 668.

161. JUDGE—Disqualification.—The part ownership of a mine by the brother of the judge before whom an action involving a lease of part of the property is about to be tried does not of itself disqualify the judge where there is nothing to show that the brother's interest was covered by the lease, or in any way affected thereby.—*Patrick v. Crowe*, Colo., 25 Pac. Rep. 986.

162. JUDGE—Special Judge.—Where the court orders the election of a special judge to decide application for change of venue which the special judge denied and tried the case and where the judgment was reversed because the order should have been for the election of a special judge to hear the application and try the case: *Held*, that on the return of the case to the trial court the regular judge had authority to make a proper order for the election of a special judge.—*State v. Buling*, Mo., 15 S. W. Rep. 367.

163. JUDGMENT—Collateral Attack.—When notice of suit is given by publication, the judgment of the court, acting upon such notice, that the publication and the affidavit therefor are sufficient to confer jurisdiction, is conclusive upon parties and privies on collateral attack.—*Goodell v. Starr*, Ind., 26 N. E. Rep. 793.

164. JUDGMENT—Joint Defendants.—Where an action for money is brought against three defendants alleged in the complaint to be indebted to plaintiff, and the court finds that all the allegations of the complaint are true, a judgment against two of them only, on such finding, is erroneous.—*Boys v. Shawhan*, Cal., 25 Pac. Rep. 1063.

165. JUDGMENT—Setting Aside—Discretion.—On appeal he court below will not be held to have abused its discretion in setting aside a judgment quieting title in plaintiff, on a showing that the disclaimer filed by defendant's attorney was under a misapprehension on his part that defendant's conveyance of the property to a third person was made before commencement of the suit.—*Underwood v. Underwood*, Cal., 25 Pac. Rep. 1065.

166. JUSTICE OF THE PEACE—Default.—In an action before a justice where the plaintiff fails to appear and prosecute his action within one hour after the time for appearance and the defendant has filed no set-off or counter-claim the proper judgment is one dismissing the action with costs to defendant without prejudice to a new action.—*Buena Vista Freestone Co. v. Parish*, W. Va., 12. S. E. Rep. 817.

167. LIBEL.—Facts herein where action was brought charging a libel in relation to one's business, *held* not sufficient to constitute a cause of action.—*Hardy v. Williamson*, Ga., 12 S. E. Rep. 874.

168. LIENS—Description.—A notice of claim of lien on lumber, describing it as "a quantity of lumber, being about 70,000 feet, now lying at defendants' saw mill in said county," is insufficient, under Code Wash. § 1947.—*Dexter, Horton & Co. v. Wiley*, Wash., 25 Pac. Rep. 1071.

169. LIENS—Priorities.—A railroad mortgagor of a locomotive, retaining possession under the terms of the mortgage, and also after forfeiture and breach, will be presumed to be the mortgagee's agent to keep it in repair, and has the right to create a lien thereon for repairs made after the forfeiture.—*Watts v. Sweeny*, Ind., 26. N. E. Rep. 680.

170. LIMITATION OF ACTIONS—Lease.—Under a contract for the leasing of coal lands and mining rights by lessees to recover possession after eviction that the right conveyed is an interest in lands within the statute —*Benavides v. Hunt*, Tex., 15 S. W. Rep. 396.

171. LIMITATIONS—Exceptions.—In a suit against the widow and heirs of his uncle brought by plaintiff to recover his share of the profits of a partnership the facts herein do not constitute such a trust as is exempted from the operation of the statute of limitations.—*Hightower v. Hester*, Tex., 15 S. W. Rep. 415.

172. LIQUOR NUISANCE—Attorneys' Fees.—In an action to enjoin a liquor nuisance under Laws Iowa 1886, ch. 66, brought by the county attorney in the name of the State, he is entitled to the attorneys' fees taxed as costs in the case.—*Farr v. Seaward*, Iowa, 48 N. W. Rep. 67.

173. MANDAMUS—Alternative Writ.—When a rule to show cause why a peremptory writ of *mandamus* should not issue is made and served upon the defendant, and he answers disputing the facts upon which the application is based, an alternative, and not a peremptory writ should be issued in a first instance.—*American Waterworks Co. v. State*, Neb., 48 N. W. Rep. 64.

174. MANDAMUS—Substitution.—Where it appears that the right of action will be lost for want of substitution of parties, *mandamus* will issue to compel the circuit judge to make an order therefor.—*Wood v. Lawrence*, Mich., 47 N. W. Rep. 1103.

175. MARITIME LIENS—Damage for Torts.—A person injured by the negligence of the master and owners, while employed in loading coal upon a foreign vessel as a supply, has a lien upon the vessel for his damages. —*The Christobal Colon*, U. S. D. C. (La.), 44 Fed. Rep. 803.

176. MARRIED WOMAN—Separate Estate.—The rent, income or profits of a wife's separate statutory real property cannot be subjected by creditors of her husband to the payment of her husband's debts.—*Marye v. Root*, Fla., 8 South. Rep. 636.

177. MASTER AND SERVANT—Assumption of Risk.—A master who provides and keeps proper tools for the use of his servants, whose duty it is to select such as they require for their work, is not in general responsible if a servant voluntarily uses a tool which has become obviously defective and unfit for use, and is injured by reason of such defect.—*Hefferen v. Northern Pac. R. Co.*, Minn., 48 N. W. Rep. 1.

178. MASTER AND SERVANT—Contributory Negligence. —An employee who is under orders to couple cars with a stick only, and is injured while coupling with his hand without a stick, is himself in fault, and cannot recover.—*Rome & C. Const. Co. v. Dempsey*, Ga., 12 S. E. Rep. 882.

179. MASTER AND SERVANT — Fellow-servant.—In an action by a laborer in a mine for injuries occasioned by the falling of a roof, the unsafe condition of which was known to the owners who had been requested to make it safe but had failed to do so, plaintiff is not precluded from recovering because of the fact that the "mine boss," his fellow-servant, was also negligent in respect of the dangerous roof.—*Rogers v. Leyden*, Ind., 26 N. E. Rep. 210.

180. MASTER AND SERVANT—Fellow-servants.—Fellow-workmen are in a common employment when each of them is employed in a service or work of such a kind that all others, in the exercise of ordinary sagacity, ought to be able to forsee, when accepting employment, that it may probably expose them to the risk of injury in case he is negligent.—*Lindvall v. Woods*, U. S. C. C. (Minn.), 44 Fed. Rep. 855.

181. MASTER AND SERVANT—Injuries to Servants.—In Georgia, a railroad company is liable for injuries to an employee wholly caused by the negligence of a fellow-servant, whether or not such injuries are connected with the running of trains.—*Georgia Railroad & Banking Co. v. Brown*, Ga., 12 S. E. Rep. 812.

182. MASTER AND SERVANT—Latent Defect.—Where in an action by a servant against his master for personal injury received in the latter's service caused by the breaking of a fork handle, the undisputed evidence of plaintiff's witnesses shows that the handle appeared to be sound, but that it had a latent defect, which was not observable until after the accident, the court should instruct the jury that the plaintiff cannot recover.—*McAvoy v. Philadelphia Woolen Co.*, Pa., 21 Atl. Rep. 246.

183. MASTER AND SERVANT—Risks of Employment—Machinery.—Plaintiff, while in defendant's employ as a grinder on an emery stone, was injured by its bursting. Over the stone was an iron plate, through the center of which a small part of the stone projected. The plate was fastened at each corner to an iron standard, which extended only part way through the plate: *Held*, that the mere fact that plaintiff might not have been injured had the plate been bolted down would not render defendants liable, as a master is bound only to furnish machinery in ordinary use.—*Augerstein v. Jones & Laughlins*, Pa., 21 Atl. Rep. 24.

184. MASTER AND SERVANT—Wrongful Discharge—Evidence.—In an action by a book-keeper for damages for wrongful discharge and for compensation for extra services defendant pleaded that plaintiff was discharged for cause, and defendant's chief clerk testified that plaintiff neglected his duty while in defendant's service: *Held*, a letter written by such clerk, bearing testimony to plaintiff's promptness and efficiency as book-keeper was competent evidence in rebuttal.—*Western Manufacturers' Mut. Ins. Co. v. Boughton*, Ill., 26 N. E. Rep. 591.

185. MECHANICS' LIENS—Affidavit.—The second section of the act of June 3, 1887, gives a lien for labor in "construction, repairing or operating" a mill, and the affidavit in the attachment proceeding authorized by the act should show, in substance, that the labor for which the lien is claimed was performed in constructing or repairing the mill, or something which is, within the meaning of the statute, "a part of the mill," or in the operation of it.—*Stearns v. Jaudon*, Fla., 8 South. Rep. 640.

186. MECHANICS' LIENS—Affidavit.—Where the affidavit states that the work was done and the material furnished on dates specified in the statement of account that the statement contains only one date, September 2, the affidavit and statement are sufficient when

they together show that the contract was made August 20, and the work was finished September 2.—*Banks v. Berg*, Iowa, 48 N. W. Rep. 90.

187. MECHANICS' LIENS—Completion of Work.—A contractor engaged in preparing a flume bed, surface ditch and terminal approaches for a water-works company abandoned the contract, with the the consent of the company: *Held*, that the company, by releasing the contractor, and taking control of the work for the purpose of completing it, "occupied" and "accepted" it, within the meaning of Code Civil Proc. Cal. § 1187.—*Giant-Powder Co. v. San Diego Flume Co.*, Cal., 25 Pac. Rep. 976.

188. MECHANICS' LIENS—Contract.—The filing of a contract for the erection of a building, made by the owner in the name of an agent merely, and not disclosing the owner's name, will not protect the building from liens under the mechanics' lien law.—*Willets v. Earl*, N. J., 21 Atl. Rep. 327.

189. MECHANIC'S LIEN—Description.—Where the owner makes no objection to the sufficiency of the description of the buildings the contractors cannot set up its insufficiency in a proceeding to enforce a mechanic's lien by the material furnisher.—*Weathered v. Garrett*, Pa., 21 Atl. Rep. 319.

190. MECHANICS' LIENS — Enforcement.—Where the contract of sale recites that "said C hereby sells to M" certain lots, providing for payments, and for the surrender of possession at a future time, this is a completed sale, and M's title, after he has paid the price and taken possession, is prior to the interest of a contractor who erected a building on the land for C, and did not file his statement for a lien until several days after the above contract was executed.—*Frost v. Clark*, Iowa, 48 N. W. Rep. 82.

191. MECHANIC'S LIEN—Notice.—Under Code Wash. § 1881, *held*, that notice is defective where it states that the material and labor for which the lien is claimed were furnished under a subcontract, but omits to set out the terms of the original contract.—*Gates v. Brown*, Wash., 25 Pac. Rep. 914.

192. MECHANICS' LIENS—Notice—Demand.—To entitle a person to the benefit of the mechanic's lien law (Revision N. J. p 668, § 3), there must, before giving such notice, have been a personal demand for payment on the contractor.—*Williams v. Bradford*, N. J, 21 Atl. Rep. 331.

193. MECHANIC'S LIEN—Preference.—The preference given by Elliott's Supp. Ind. § 1705, applies to all the classes of claims for which the lien is given.—*Goodbub v. Horming's Est.*, Ind., 26 N. E. Rep. 770.

194. MINES—Description.—Where the location notice for a mining claim refers to a permanent monument, and is recorded in the county in which the claim is actually situated, the fact that the location notice, after giving the courses and distances, which show it to be in one county, describes it as being in another, will not vitiate the description.—*Metcalf v. Prescott*, Mont., 25 Pac. Rep. 1037.

195. MINING LEASE—Construction.— *Held*, that under the terms of the lease, the lessee is not entitled to certain refuse of ores and injunction will lie at the suit of the lessor to restrain its removal.—*Doster v. Friedensville Zinc Co.*, Penn., 21 Atl. Rep. 251

196. MORTGAGE— Acknowledgment.—A certificate of acknowledgment to a real estate mortgage which does not show that the mortgagor voluntarily executed the instrument is invalid.—*Keeling v. Hoyt*, Neb., 48 N. W. Rep. 66.

197. MORTGAGE—Construction of Contract.—Defendant conveyed land to plaintiff as security for a debt, under an agreement that he was to remain in possession for a certain time, during which he might pay the debt and receive a reconveyance. If he should sell the land, he was to pay the debt and keep the excess, and if plaintiff should sell it, he was to pay the excess to defendant: *Held*, that the agreement amounted to a mortgage.—*Hunter v. Maanum*, Wis., 48 N. W. Rep. 51.

198. MORTGAGE—Foreclosure.—Where the mortgagee, upon a foreclosure of his mortgage, agrees with the mortgagor, in case of a sale, to purchase the property at the lowest price he can, and then convey it to the mortgagor, and he does so purchase, he continues to hold the title as security only for the payment of the amount due upon his decree.—*Snyder v. Greaves*, N. J., 21 Atl. Rep. 291.

199. MORTGAGE—Foreclosure — Merger. — Where the holder of two overdue mortgages on the same land forecloses the junior mortgage, and buys in the land subject to the senior mortgage in part satisfaction of the junior mortgage, and no redemption is made, the senior mortgage will, when the time for redemption expires, merge in the fee.—*Belleville Savings Bank v. Reis*, Ill., 26 N. E. Rep. 646.

200. MORTGAGE—Notice.— Where a mortgage which defectively describes the land is recited in the deeds under which a purchaser from the mortgagor claims title he will be charged with notice of it.—*Knox County v. Brown*, Mo., 15 S. W. Rep. 382.

201. MORTGAGE—Possession.—If a purchaser at a defective foreclosure sale, or his assigns, goes into possession of the mortgaged premises, with assent of the mortgagor or his successors in interest, under the right supposed to have been acquired under the foreclosure sale, he will be deemed a mortgagee in possession.—*Russell v. H. C. Akeley Lumber Co.*, Minn., 48 N. W. Rep. 3.

202. MORTGAGE—Redemption. — A second mortgagee who had foreclosed his mortgage, but had made no sale thereunder, purchased the mortgaged land at a sale under the first mortgage. At that time there were judgments standing against him under which the land was sold to plaintiff, but not until after said second mortgagee had mortgaged it to defendant. The mortgage sale was set aside, and the first mortgage redeemed from: *Held*, that plaintiff was entitled to the redemption money.—*Paxton v. Sterne*, Ind., 26 N. E. Rep. 557.

203. MUNICIPAL CORPORATION.—A special act incorporating a municipal corporation is not impliedly repealed by a subsequent general statute which treats at large of the whole subject although it contains words repealing all acts in conflict.—*Tacoma Land Co. v. Board*, Wash., 25 Pac. Rep. 904.

204. MUNICIPAL CORPORATIONS.—Under Const. Wash. art. 8, § 6, as the matter of providing whether sewer and lights for the inhabitants of a city is a strictly municipal purpose, the expense of the construction and maintenance of such works may be paid either out of the current revenues or first five per cent. of indebtedness as well as out of the additional five per cent. expressly authorized for that purpose.—*Metcalf v. City o Seattle*, Wash., 25 Pac. Rep. 1010.

205. MUNICIPAL CORPORATION—Voluntary Payment—Assessments.—Where property owners, after having been in possession eleven years, pay a street assessment levied on the property six years before they came into possession, payment of which has never been demanded by the city, payment being made finally in order to obtain a loan on the property, and immediately bring an action for the amount so paid they cannot recover.—*Redmond v. Mayor*, N. Y., 26 N. E Rep. 727.

206. MUNICIPAL CORPORATIONS—Defective Streets.—A city is not liable to a person who, while driving on a street 84 feet wide, the center 40 feet of which are 12 or 18 inches lower than the 22 feet on each side, is thrown from his wagon because of his horse shying and making the wheels strike one of the elevated sides.—*Johnson v. City of Philadelphia*, Penn., 21 Atl. Rep. 316.

207. MUNICIPAL CORPORATIONS — Defective Streets.—The fact that a traveler walks upon a defective sidewalk, knowing it to be defective, does not bar him from recovering for personal injuries caused by such defect, if he has exercised ordinary and reasonable care.—*City of Flora v. Nancy*, Ill., 26 N. E. Rep. 645.

208. MUNICIPAL CORPORATIONS—Invalid Assessment—Payment.—Where a land-owner could have discovered the invalidity of an assessment for a local improvement by the inspection of the records on file in the public offices, and where the court of appeals has in two cases, based on similar facts, declared the assessment invalid, a payment thereof in order to free the land from the apparant incumbrance so as to enable him to complete its sale.—*Tripler v. Mayor*, N. Y., 26 N. E. Rep. 721.

209. MUNICIPAL CORPORATIONS—Liabilities.—A municipal corporation, unless prohibited by its charter, is liable for the professional services of a physican in attending persons afflicted with small-pox, within its limits, employed by a committee assuming to act for it, when such services have been rendered with knowledge of its officers, and without notice that the contract of employment is not recognized as valid and binding.—*Ward v. Town of Forrest Grove*, Oreg., 25 Pac. Rep. 1020.

210. MUNICIPAL CORPORATION — Ordinances — Street Processions.—Under Rev. St. Ill., ch. 24, art. 5, § 1, the council has no power to ordain that no procession shall be allowed upon the streets until a permit shall be obtained therefor from the superintendent of police, leaving the issuance of such permits to his discretion. —*City of Chicago v. Trotter*, Ill., 26 N. E. Rep. 359.

211. MUNICIPAL CORPORATION—Street Paving.—In action to enforce a lien on property for street paving where the city has made out a *prima facie* case, whether the street was dedicated before the contract was awarded whether there was a proper advertisement and the work let to the lowest bidder and work was done in accordance with the ordinance etc., are mere matters of defense.—*City v. Macpherson*, Penn., 21 Atl. Rep. 227.

212. MUNICIPAL OFFICERS—Appointment by Council.—A common council being constituted as it will be when a term of office about to expire shall end, and having authority to appoint the successor of the incubent, may lawfully make such appointment before the expiration of the current term.—*State v. Lane*, N. J., 21 Atl. Rep. 302.

213. NEGLIGENCE — Dangerous Premises. — A waterworks company, having laid its pipes under the streets of a city, is liable for an injury to a traveler caused by its having so negligently filled the trenches that the earth was washed out by heavy rains.—*Southern Exp. Co. v. Texarkana Water Co.*, Ark., 15 S. W. Rep. 361.

214. NEGLIGENCE—Dangerous Premises.—The lessor of a wharf is not liable for injuries to a servant of the lessee caused by the breaking of a rotten plank unless it is shown that he knew, or with reasonable care might have known, the existence of the defective plank when the wharf was leased.—*State v. Boyce*, Md., 21 Atl. Rep. 322.

215. NEGLIGENCE—Pleading.—A declaration against a gas company for personal injuries occasioned an employee by the explosion of a tank need not allege specifically the defect, of which plaintiff had no knowledge or means of knowledge.—*Cox v. Providence Gas Co.*, R. I., 21 Atl. Rep. 344.

216. NEGOTIABLE INSTRUMENT — Pleading. — To the complaint on a note defendant alleged a total failure of consideration in that the note was given in consideration of the delivery of a note and mortgage to defendant which plaintiff refused to deliver to which there was no reply which constitutes a denial under Code Iowa, sec. 2712. *Held*, that the question of the waiver of the breach of condition by the acceptance of the note and mortgage after the breach was not raised by the pleadings. — *First Nat. Bank v. Wright*, Iowa, 48 N. W. Rep. 91.

217. NEGOTIABLE INSTRUMENT—Pleading—Consideration — Vacating Judgment.—Under Civil Code Cal. §§ 1614, 1615 in pleading upon a note, it is unnecessary to aver a consideration.—*Poirier v. Gravel*, Cal., 25 Pac. Rep. 962.

218. NEGOTIABLE INSTRUMENT— Sealed Instrument.—An instrument in the form of a negotiable promissory note, but with a scroll in which the word "seal" was written, after the signature of the maker, is a sealed instrument, and not a negotiable promissory note, though there is no reference to a seal in the body of the instrument.—*D. M. Osborne & Co. v. Hubbard*, Oreg., 25 Pac. Rep. 1021.

219. NEGOTIABLE INSTRUMENT—Transfer.—The transferee for value of a note, after maturity, acquires no better title than that of his transferrer.—*Walker v. Wilson*, Tex., 15 S. W. Rep. 402.

220. NEW TRIAL—Newly-discovered Evidence.—A new trial is properly refused, where the newly-discovered evidence is argumentative, and a mere repetition of the testimony at the trial.—*Thompson v. Thompson*, Cal., 25 Pac. Rep. 962.

221. NOTARY PUBLIC.—Notaries public are not authorized by any law of the United States to administer oaths to affidavits required by the rules and regulations prescribed by the commissioner of the general land-office—*United States v. Manion*, U. S. D. C. (Wash.), 44 Fed. Rep. 800.

222. NUISANCE—Damages.—Though it is not proper to allow the recovery of prospective damages for a nuisance which is capable of abatement, yet, where a railroad company has constructed its embankment in front of plaintiff's house in such a way that upon the occasion of each considerable rain-fall the water accumulates in pools, and has refused upon application, to put in a culvert to drain the water off it is not error to treat the nuisance as a permanent.—*Rosenthal v. Taylor etc. R. Co.*, Tex., 15 S. W. Rep. 268.

223. NUISANCE—Noise—Injunction.—The noise and vibrations of machinery, necessarily made in conducting a lawful business in a neighborhood exclusively devoted to manufacturing purposes, will not be enjoined because it disturbs the occupant of an adjoining building. —*Straus v. Barnett*, Penn., 21 Atl. Rep. 253.

224. PARTNERSHIP—Surviving Partner.—The surviving partner entitled to the possesion of, and to control and use, both the real and personal property of the firm so long as is required to settle and close its business, and until the business is closed the realty will be treated in equity as personal property.—*Aken v. Clark*, Iowa, 48 N. W. Rep. 73.

225. PAYMENT—Mutual Mistake.—In an action to recover money alleged to have been paid by mistake, the existence of a written contract between the parties does not render incompetent oral evidence of prior negotiations showing that the payment was no part of the transaction evidenced by the writing, and that, it was wholly without consideration, and resulted from a mutual mistake.—*Stewart v. Kindel*, Colo., 25 Pac. Rep. 990.

226. PEDDLER.—A person who has a store and travels through the adjoining country soliciting orders, which he afterwards fills, is not a peddler.—*Commonwealth v. Eichenburg*, Pa., 21 Atl. Rep. 258.

227. PLEADING AND PROOF.—A mere general averment of fraud and illegality, without stating the facts on which the charge is based, presents no issue, and no proof is admissible thereunder.—*Kingman etc. R. Co. v. Quinn*, Kan., 25 Pac. Rep. 1068.

228. PLEDGOR—Failure to Enforce Collaterals.—Where a party who is indebted executes his notes to his creditor payable at different times, and subsequently assigns and transfers non-negotiable notes which he holds against other parties to said creditor as collateral security for the payment of his notes held by said creditor, it is the duty of such creditor to use reasonable care and diligence to make said notes, received as collatteral security, available.—*Rumsey v. Laidley*, W. Va., 12 S. E. Rep. 866.

229. PRINCIPAL AND AGENT—Undisclosed Principal.—A principal is liable for goods sold to his agent, who is in charge of his hotel, though the principal is undisclosed at the time of the sale, and the goods are delivered and

charged to the agent, who is supposed by the seller to be the proprietor of the hotel.—*Schendell v. Stevenson*, Mass., 26 N. E. Rep. 689.

230. PRINCIPAL AND SURETY — Guardian and Ward.—Where a guardian sold his ward's land to a third person re-purchased it and then mortgaged it. *Held*, in suit against guardian by a surety on guardian's bond, who had been compelled to pay, that in the absence of proof of fraud, the confirmation of the sale and the ward's acquiescence barred the surety for attacking the sale.—*Schur v. Shcwartz*, Penn., 21 Atl. Rep. 249.

231. PROHIBITION — Mandamus.—Prohibition will not lie to restrain the superior court from further proceedings in an application for *mandamus* where the writ has already issued, and no application was made at the hearing, by motio nor plea, to test the jurisdiction of the court in the premises.—*State v Superior Court of Whatcom County*, Wash., 25 Pac. Rep. 1007.

232. QUIETING TITLE.—The question whether the facts sufficient to enable plaintiff to maintain suit to quiet title.—*Bausman v. Faue*, Minn., 48 N. W. Rep. 14.

233. QUO WARRANTO—Pleading.—An averment in a petition in *quo warranto* to test the title of councilmen to the office, that defendants, "in conjunction with the mayor of said city, passed laws for the government of said city and appoint minor officers, and do and assume to do what should be done by lawful councilmen," admits that the city is lawfully incorporated.—*Noel v. Aron*, Miss., 8 South. Rep. 647.

234. RAILROAD COMPANIES—Accidents at Crossing.—A railroad company is not liable for an accident at a crossing if the person killed failed to look in each direction on the track before attempting to cross though the statutory signals by the train may not have been given.—*Rodrian v. New York, N. H. & H. R. Co.*, N. Y., 26 N. E. Rep. 741.

235. RAILROAD COMPANIES — Municipal Aid. — Under Acts 16th Gen. Assem. Iowa, ch. 123, § 6, persons receiving shares for taxes voted and paid after the recording of a mortgage for more than $16,000 per mile cannot recover against the directors who voted the same.—*Walker v. Birchard*, Iowa, 48 N. W. Rep. 71.

236. RAILROAD CROSSING—Validity of Ordinance.—An ordinance of the city of St. Paul limiting the speed of railway trains within the city limits to four miles an hour, *held*, under the facts to be unreasonable and void as applied to a certain part of defendant's road in the suburbs of the city.—*Erison v. Chicago, etc. R. Co.*, Minn., 48 N. W. Rep. 6.

237. RAILROAD IN STREET — Ordinance.— A railroad company, which has located a single track along a city street under an ordinance granting it the right to construct its railroad along the street within certain limits, and under general proceedings of appropriation in which damages were assessed to adjacent landowners, is not restricted to one track, but has the right to construct additional tracks if required by its business.—*Chicago, etc. R. Co. v. Eisert*, Ind., 26 N. E. Rep. 750.

238. REAL ESTATE AGENTS—Commissions.—A real estate agent employed to collect the rents on a lease taken in his name for the owners, but not negotiated by him, is not entitled to a commission for the whole life of the lease, but only to commissions for collecting the rent while employed for that purpose by the owners.—*Lucas v. Jackson*, Pa., 21 Atl. Rep. 310.

239. REAL ESTATE AGENTS—Commissions.—If there was no limit as to time in authority to sell, the owner could revoke it at any time, and if, at the time of the revocation the agent had a negotiation pending which the owner afterwards consummated, the agent was entitled to his commission.—*Knox v. Parker*, Wash., 25 Pac. Rep. 909.

240. RELIGIOUS SOCIETIES—Power of Officers.—A resolution purporting to be passed by the vestry of a church, and signed by a majority of the vestry-men, but which was in fact adopted at a meeting attended by less than a legal quorum, and was afterwards signed by a vestry-man who did not attend the meeting, is not binding on the corporation. — *Appeal of Rittenhouse*, Penn., 21 Atl. Rep. 254.

241. REMOVAL OF CAUSES—Amendment. — Where an application to remove a cause to a federal court, on the ground of local prejudice has been denied, a motion, made several months later, to amend the petition so as to set up another ground for the removal, is too late, and will be refused.—*Carson & Rand Lumber Co. v. Holtzclaw*, U. S. C. C. (Mo.), 44 Fed. Rep. 785.

242. RES ADJUDICATA.—A final adjudication of a court of competent jurisdiction upon the merits of a controversy, so long as it remains unreversed, is a bar to any new suit for the same cause of action between the same parties.—*Burner v. Hevener*, W. Va., 12 S. E. Rep. 861.

243. RES ADJUDICATA—Deed. — Upon the facts, *held* that the findings and judgment in a former case brought to set aside a quitclaim deed to certain real estate are conclusive and binding upon the plaintiff on the question of title to the real estate in question.—*Oldham v. Stephens*, Kan., 25 Pac. Rep. 863.

244. RES ADJUDICATA—Dissolution of Injunction.—An order dissolving an injunction, based on the merits of the case, where the only relief sought by the bill is such injunction, is, as regards finality, such a decision as will sustain the defense of *res judicata*.—*Gallaher v. City of Moundsville*, W. Va., 12 S. E. Rep. 859.

245. RES ADJUDICATA—Verdict.—A debtor assigned a note to his creditor, an attorney, as collateral security. The latter took judgment on the note in his own name, but failed to collect it. The debtor then sued the creditor for negligence as an attorney in not collecting the judgment. A demurrer was sustained to the complaint, whereupon the debtor brought another suit, alleging the same facts, but counting on the creditor's negligence as an assignee: *Held*, that the judgment on the demurrer was a bar to the second suit.—*Nickless v. Pearson*, Ind., 26 N. E. Rep. 478.

246. RESULTING TRUST. — A childless widower long estranged from his wife bought real estate and made mortgage loans and had the deeds and notes run to relatives of his wife though they knew nothing of the transactions at the time: *Held*, in a suit brought by his heirs that he had only a resulting trust for life with remainder to said grantee.—*Cook v. Patrick*, Ill., 26 N. E. Rep. 658.

247. SALE—Fulfillment of Contract.—In an action for the price of an elevator, which was put up under an agreement that it should be taken out at plaintiff's expense if it did not fulfil the contract, and that it was to be paid for "when in running order satisfactory to" defendant, a nonsuit is properly entered where plaintiff's own testimony shows that the elevator did not run satisfactorily.—*Howard v. Smedley*, Penn., 21 Atl. Rep. 253

248. SALE—Rescission. — Where a seller of personal property, by a contract which provides that the title shall remain in him until payment of the price, has received in part payment other goods, he cannot, on refusal of the purchaser to pay the balance, maintain replevin for the goods sold, without first returning the goods received in part payment.—*Latham v. Davis*, U. S. C. C. (Colo.), 44 Fed. Rep. 862.

249. SALE—Execution—Sheriff.—*Held* upon the facts, that the sale was valid and that the sheriff had not abused the discretion vested in him.—*Barnes v. Zoercher*, Ind., 26 N. E. Rep. 769.

250. SALE—Warranty.—Upon the facts *held* a warranty that the flax seed sold should be sufficient for the purpose of sowing and raising a crop from it.—*Shaw v. Smith*, Kan., 25 Pac. Rep. 886.

251. SALE—Warranty of Quality—Set-off.— Where defendants have purchased and paid for belting with an express or implied warranty of quality which could not be ascertained before a trial of the belting, and it then proves to be utterly worthless, they can set-off its price in a suit for the price of a subsequent purchase of belting by them from plaintiff.—*Gutta Percha & Rubber Manuf'g Co. v. Wood*, Mich., 48 N. W. Rep. 28.

252. SALE OF DECEDENT'S LAND.—*Held*, that sufficient appeared by the records to show a valid sale of decedent's real estate and that the purchaser thereunder acquired good title.—*Keller v. Amos*, Neb., 48 N. W. Rep. 59.

253. SALE OF LAND—Fraud of Vendor.—No mere oral representation, made at the time of executing a contract for the sale of land, as to the quantity of land to be conveyed, unless of such a character as to amount to a fraud, is competent evidence to charge the vendor with liability, even if the land actually conveyed does not contain the full quantity orally represented.—*Garbanati v. Fassbinder*, Colo., 25 Pac. Rep. 991.

254. SCHOOLS—Contract with Teacher.—A contract between a school trustee and a teacher to pay "good wages" is too indefinite to found an action upon.—*Fairplay School Tp. v. O'Neal*, Ind., 26 N. E. Rep. 686.

255. SCHOOLS—Mandamus—Contempt.—In a *mandamus* proceeding to compel defendant to readmit the relator's son to the public schools and at the final hearing a peremptory writ was granted. The boy was thereupon readmitted to the school, but was afterwards again suspended for a second violation of the same rule: *Held*, that such second suspension did not constitute a contempt of court.—*Bowers v. State*, Ind., 26 N. E. Rep. 798.

256. SCHOOLS AND SCHOOL-DISTRICTS — Teachers.—Where the president of a board of school directors is authorized to employ teachers with the consent of the board, and one whom he employs as a teacher, by written contract, begins teaching under the contract, with the knowledge of each member of the board, the consent of the members will be presumed.—*Hull v. Independent School-District of Aplington*, Iowa, 48 N. W. Rep. 82.

257. SET OFF AND COUNTERCLAIM—Administrators.—An administrator may set off a distributee's indebtedness to the intestate's estate against an attachment of such distributee's interest therein.—*Brown's Adm'r v. Mattingly*, Ky., 15 S. W. Rep. 353.

258. SHERIFF—Failure to Serve Process—Damages.—Where a valid order of attachment is issued the sheriff must seize the property described and hold it, and, if he surrenders it without authority of the court or the execution of a bond, he is liable to the plaintiff in an action therefor, even though the damages are merely nominal.—*Yampert v. Johnson*, Ark., 15 S. W. Rep. 363.

259. SLANDER—Pleading.—In an action for slander in charging plaintiff with adultery with one man, an answer averring that plaintiff did commit adultery with another man is bad.—*Buckner v. Spaulding*, Ind., 26 N. E. Rep. 792.

260. SPECIFIC PERFORMANCE.—A lease of land recited that the party of the first part reserves the right of selling said land at any time; but no such sale shall be made without giving the second party the privilege of purchasing upon such terms and at the same price as any other person might have offered therefor: *Held*, that said contract was not enforceable in equity, being neither certain nor mutual.—*Hayes v. O'Brien*, Ill., 26 N. E. Rep. 601.

261. SPECIFIC PERFORMANCE—Vendor and Vendee.—In as much as the contract for sale of land in effect granted an option to the vendee while the vendor was bound in any event to make a title there was such want of mutuality that equity would not decree specific performance.—*Glass v. Rowe*, Mo., 15 S. W. Rep. 334.

262. STATE BONDS—Appropriation.—A promise to pay, contained in a State bond or certificate, is not an appropriation.—*Carr v. State*, Ind., 26 N. E. Rep. 778.

263. STATUTE—Convicts—Hiring.—Acts Miss. 1890, ch. 80, entitled "An act to provide for hiring prisoners sentenced to fine and imprisonment in the county jail of certain counties," and making no provision for the discharge of prisoners who are not hired out within 10 days, by implication repeals, as to the counties to which it refers, Act Miss. March 9, 1882, which provides that prisoners may, if not hired out within 10 days, make a schedule of their property under oath, and be discharged.—*Ex parte McDaniel*, Miss., 8 South. Rep. 645.

264. STOCK KILLING CASES—Negligence.—Code Ala. § 1144, making it the duty of any person having control of a locomotive, on entering into or passing through a village, town, or city, to give certain signals, etc., has no application to an action for injury to live-stock caused by a detached car left standing on a side track to be unloaded.—*Montgomery, etc. Ry. Co. v. Perryman*, Ala., 8 South. Rep. 699.

265. STREET RAILROADS—Negligence.—*Held*, that the facts herein where a street car ran over plaintiff's child were sufficient to constitute negligence.—*San Antonio St. R. Co. v. Caillonette*, Tex., 15 S. W. Rep. 390.

266. SUBROGATION—Mortgages.—Where the fund resulting from the sale of an insolvent's property is not sufficient to pay the claims of creditors secured by a mortgage the unsecured creditors are not entitled to be subrogated to the mortgage securities to the extent that the fund has been applied to their payment.—*In re Graff*, Penn., 21 Atl. Rep. 233.

267. SUNDAY—Barber-shop.—Shaving customers for hire in a barber-shop is not a "work of necessity," within the exceptions of the Pennsylvania Sunday law of April 22, 1794.—*Commonwealth v. Waldman*, Penn., 21 Atl. Rep. 248.

268. TAXATION—Assessment.—Where property had been assessed and thereafter an additional valuation and an additional charge is placed thereon, the taxes so charged are void, and collection of them may be restrained by injunction.—*Topeka City R. Co. v. Roberts*, Kan., 25 Pac. Rep. 854.

269. TAXATION—Assessment.—The assessment, being in the name of the only owner known on the records, is sufficient and legal.—*Gee v. Clark*, La., 8 South. Rep. 627.

270. TAXATION—Assessment of Coal Lands.—Rev. St. Ill. ch. 120, § 4, does not forbid separate assessments of the land and the coal where they are owned by different persons, and the assessed value of the coal is deducted from that of the land.—*Consolidated Coal Co. of St. Louis v. Baker*, Ill., 26 N. E. Rep. 648.

271. TAXATION—Corporations.—Where the entire capital stock of a corporation is invested in tangible property duly assessed, the corporation need not, in order to restrain the collection of a tax on the capital stock, made a tender of the taxes due on its tangible property, as no tax whatever is due on the capital stock.—*Hyland v. Brazil Block Coal Co.*, Ind., 26 N. E. Rep. 673.

272. TAXATION—Exemption.—*Held*, that the use which the educational associational made of its home was not for a literary or educational purpose, within the meaning of Pub. St. Mass. ch. 11, § 5, cl. 3.—*St. James Educational Inst. v. City of Salem*, Mass., 26 N. E. Rep. 636.

273. TAX-DEEDS—Insufficient Description.—A tax-deed is void in which the only description of the land is "787 acres of land granted to S," and is avoided for all purposes by the grantee's procuring the county surveyor to survey the land, and to insert his field notes in the tax-deed as a part of the description.—*Claiborne v. Elkins*, Tex., 15 S. W. Rep. 395.

274. TAX—SALES—Redemption.—Where the purchaser at the trustee's sale redeems from the tax sale, the decree should allow the holder of the tax title a reasonable time in which to redeem from the trust-deed.—*Giraldin v. Howard*, Mo., 15 S. W. Rep. 383.

275. TESTAMENTARY POWERS—Sales of Land.—A will devised all the testator's real estate, and gave the executors power to convey "any real estate that may come into their possession and control under this will, the will not otherwise expressly giving them possession or control of any real estate: *Held*, that the power applied to all the real estate.—*Ness v. Davidson*, Minn., 48 N. W. Rep. 10.

276. TOWNSHIP—Taxation.—Under par. 7084 Gen. St. 1889, township trustees are authorized, with the advice

and consent of the board of county commissioners of their respective counties to levy a tax for township, road and other purposes.—*Kansas City, etc. R. Co. v. Scammon*, Kan., 25 Pac. Rep. 858.

277. TRIAL—Challenges in Criminal Cases.—The act of congress of June, 1872, as embodied in section 819 of the Revised Statutes, restricts parties indicted for felony to twenty peremptory challenges; and, where several parties are indicted for a joint felony, they are deemed a single party for the purposes of all challenges under that section.—*United States v. Hall*, U. S. C. C. (Ga.), 44 Fed. Rep. 883.

278. TRIAL—Jury.—In New Mexico, when trial by jury is waived, the verdict of the court may be reviewed on appeal the same as a verdict of the jury.—*Lynch v. Grayson*, N. Mex., 25 Pac. Rep. 992.

279. TRIAL—Jury.—Persons who have legally declared their intention of becoming citizens are not, by reason of their foreign birth, disqualified to act as jurors.—*Abrigo v. State*, Tex., 15 S. W. Rep. 408.

280. TRUSTS—Accounting.—In a suit to compel a trustee to account after the death of his *cestui que trust* he answered that he still retained $500 of the trust fund, but that the *cestui que trust* had agreed to let him keep that amount as a personal loan from her: *Held*, that the trustee must account for the $500 as a trust fund, the burden being on him to show that the trust relation had been changed into that of debtor and creditor.—*Appeal of Walker*, Penn., 21 Atl. Rep. 311.

281. USURIOUS INTEREST—Recovery—Liabilities of National Bank.—Assignees under a deed of trust for the benefit of creditors are "personal representatives" within Rev. St. U. S. § 5198, providing that, in case a greater rate of interest has been paid to a national bank than is allowed by the laws of the State in which the bank is located, the person by whom it has been paid, or his legal representative, may recover twice the amount of interest thus paid.—*Henderson Nat. Bank v. Alves*, Ky., 15 S. W. Rep. 132.

282. VENDOR AND VENDEE—Assignment of Contract.—Where the holder of a contract of sale of land transfers it to another in consideration of a conveyance to himself of an undivided fourth interest in the land when a conveyance shall be obtained from the vendor, and the purchaser, by his agent, makes a quitclaim deed of this fourth interest immediately on securing the contract, it operates as an assignment of a one-fourth interest in the contract.—*Brock v. Pearson*, Cal., 25 Pac. Rep. 963.

283. VENDOR AND VENDEE—Interest.—Where the first contract between the vendor and vendee provides for the payment of interest on the purchase price, but a subsequent contract or memorandum fails to mention interest, the vendor nevertheless is entitled to it from the vendee who takes possession, receives the rents, and pays one item of interest after the execution of the second contract.—*Hoehler v. McGlinchy*, Oreg., 25 Pac. Rep. 1067.

284. VENUE—Change.—Affidavit for change of venue *held* sufficient in form and substance under the statute.—*Fatt v. Fatt*, Wis., 48 N. W. Rep. 52.

285. VENUE—Change.—Upon the facts, *held* that a change of venue should have been granted under Rev. Stat. Wis. § 2622. subd. 2, which authorizes the court to change the place of trial when there is reason to believe that an impartial trial cannot be had there.—*Cyrs v. Stewart*, Wis., 48 N. W. Rep. 50.

286. WAYS—Obstruction—Pleading.—In a suit to enjoin obstruction of a right of way, the cause of action rests upon the threatened obstruction, and the complaint, in basing complainant's right to the way both on necessity and on a right by prescription, does not state two causes of action.—*Harding v. Cowgar*, Ind., 26 N. E. Rep. 799.

287. WAYS—Prescription—Evidence.—A person claiming a right of way by prescription is not required to prove that the owner of the servient estate was not under disabilities, as disability is a matter of defense, and is never presumed.—*Faulkboner v. Corder*, Ind., 26 N. E. Rep. 766.

288. WILL—Construction.—Construction of the terms of a will involving a provision for accumulation of the residuary estate.—*In re Brooks' Est.*, Penn., 21 Atl. Rep. 240.

289. WILL—Construction.—Construction of will holding that it was the intention of testator that his surviving daughter should take only the interest of the deceased devisee, in case of her death, and not that she should take of the other devisees as well.—*Nichols v. Boswell*, Mo., 15 S. W. Rep. 343.

290. WILL—Construction.—Under the provisions of the will, a son of the testator who survived him two years was entitled to share in all the dividends from the testator's railroad stock which accrued up to the death of the widow.—*Cleghorn v. Scott*, Ga., 12 S. E. Rep. 876.

291. WILL—Construction.—A devise of land "to be valued at $90 per acre" amounts merely to giving to the devisee the option of purchasing from the residuary beneficiaries at the price named.—*Wyckoff v. Wyckoff*, N. J., 21 Atl. Rep. 287.

292. WILL—Construction.—Application of the rule that an heir at law can only be disinherited by express devise or necessary implication.—*Appeal of Jacobs*, Penn., 21 Atl. Rep. 318.

293. WILL—Construction.—A court of equity has jurisdiction of an action in behalf of the next of kin for construction of a will disposing of personal estate, where the disposition is claimed to be invalid, since, in the case of its invalidity, the executors would hold the personalty upon a resulting trust for those entitled to distribution.—*Read v. Williams*, N. Y., 26 N. E. Rep. 730.

294 WILL—Jury Trial.—The submission of a will contest to the chancellor for decree on the merits, with an agreement that the file, together with the note of the testimony, should be forwarded to him at chambers, is a waiver of the right to jury trial.—*Mathews v. Forniss*, Ala., 8 South. Rep. 661.

295. WILL—Mental Capacity.—Upon the facts, *held*, that testator, though weak in body, had sufficient mental capacity, and was not subject to undue influence on part of a niece who lived with him.—*Clifton v. Clifton*, N. J., 21 Atl. Rep. 333.

296. WILL—Right to Contest.—To entitle a person to file a *caveat*, he must have some interest in the result of the contention against the probate of the will.—*Middledith v. Williams*, N. J., 21 Atl. Rep. 290.

297. WILL—Testamentary Capacity.—Upon the facts, *held*, that there was neither undue influence nor want of testamentary capacity.—*In re Levi's Est.*, Penn., 21 Atl. Rep. 246.

298. WITNESS—Credibility.—Instruction as to credibility of witnesses, *held*, not applicable to the testimony.—*La Bouty v. Lundgren*, Neb., 48 N. W. Rep. 65.

299. WITNESS—On trial for rape, the rulings of the court permitting leading questions to be put to the prosecutrix in respect to the act in order to get the facts before the jury are not revisable.—*Brassell v. State*, Ala., 8 South. Rep. 679.

300. WITNESS—Husband and Wife—Joinder in Suit.—In a joint suit for personal injuries by husband and wife, where no objection is made to the joinder, either plaintiff being competent as a witness in his or her own behalf, is not rendered incompetent by the fact of marriage.—*St. Louis, etc. R. Co. v. Amos*, Ark., 15 S. W. Rep. 362.

301. WRITTEN CONTRACT—Parol Evidence.—In an action for the specific performance of a written contract to convey lands, parol evidence is inadmissible to show that, in addition to the consideration mentioned in the contract, the purchaser agreed to build a house on the premises, to cost not less than $10,000, and that without that agreement the property would not have been sold at the price agreed upon.—*Morgan v. Porter*, Mo., 15 S. W. Rep. 289.